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Supreme Court of the United States

OCTOBER TERM, 1928.

No. 159.

JOHN F. GILCHRIST, LEON G. GODLEY, and CHARLES C. LOCKWOOD, constituting the TRANSIT COMMISSION, etc., and THE CITY OF NEW YORK,

Appellants,

vs.

INTERBOROUGH RAPID TRANSIT COMPANY AND MANHATTAN RAILWAY COMPANY.

BRIEF FOR THE APPELLANT, THE CITY OF NEW YORK.

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No. 159

JOHN F. GILCHRIST, LEON G. GODLEY, and CHARLES C. LOCKWOOD, constituting the TRANSIT COMMISSION, etc., and THE CITY OF NEW YORK,

Appellants,

vs.

INTERBOROUGH RAPID TRANSIT COMPANY AND MANHATTAN RAILWAY COMPANY

BRIEF FOR THE APPELLANT, THE CITY OF NEW YORK.

I.

Opinion of the Court Below.

The opinion of the Statutory Court appears in the Record at p. 1968. It is reported *Interborough Rapid Transit Co. v. Gilchrist et al.*, 26 Fed. (2d) 912.

II.

Jurisdiction.

This is an appeal from an order made after notice and hearing, in the United States District Court, for the Southern District of New York, May 10th, 1928 (R. 1998) by a court of three judges, under Section 380 of the United States

Code, granting an interlocutory injunction restraining the City of New York and the Transit Commission from preventing Interborough Rapid Transit Company from charging a fare of seven (7) cents upon the Rapid Transit Railways owned by the City of New York, and operated by said Interborough Company under certain contracts known as numbers "1" "2", and "3", dated respectively February 21, 1900, July 21, 1902 and March 19, 1913, and having several years to run, each of which contains the provision that the contractor shall during the term of such contract, be entitled to charge for a single fare "the sum of five (5) cents, but not more"; and from preventing said Interborough Company from charging a fare of seven (7) cents upon certain elevated railroads, in part leased by it from Manhattan Railway Company, and in part constructed by said Interborough Company, under certificates and contracts with the City of New York, permitting the connection of such lines with and the operation of their cars over the rapid transit railways of the City of New York, being a part of the transaction involving Contract #3, and dated the same day and containing the provision that on said elevated lines said Interborough Company shall be entitled to charge for a single fare "the sum of five (5) cents, but not more."

The plaintiff claimed that the Rapid Transit Act (Laws of 1891, Ch. 4, as amended), authorizing the City of New York to construct rapid transit railroads at public expense and provide for their operation by contracts containing provisions as to rates of fare agreed upon by the parties is controlled by regulatory provisions in the Public Service Commissions Law (Laws of 1907, Ch. 429, as amended) (R. 52) and that the enforcement of the fare provisions of such contracts which it alleged to be inadequate, contra-

venes the Fourteenth Amendment of the Constitution of the United States (R. 94).

This claim was sustained by the Statutory Court (R. 1968, 1998).

III.

Statement of the Case.

If the Interborough's claim be sustained, the City's right of contract is destroyed and the City's great purpose, undertaken to relieve congestion and distribute population, is frustrated.

The annual addition to the tolls exacted on the present volume of traffic would be $23,472,925 (*R.* 4). The Interborough alleges that the City's right to terminate or recapture under contract number 3, after ten years, has been "forfeited and barred" (*R.* 57). If the contract has thirty-nine years to run, the annual addition to tolls, accumulated, at 4½%, would aggregate $2,640,704,076.

The case was heard in the Statutory Court on the pleadings and numerous affidavits. Previously the defendants had moved to strike out much of the matter in the complaint for redundancy and irrelevancy. The motions were denied (R. 1965-1967).

The Decisive Issue.

In the *complaint*, it is alleged that

> "XLIII. The said Contract No. 3 of March 19, 1913, for the construction and lease of subway extensions, was executed by the Public Service Commission for the First District, acting for and in behalf of the defendant The City of New York, pursuant to the authority of Chapter 4 of the Laws of 1891 as amended, with the approval of the Board of Estimate and Apportionment of the City of New York, acting pursuant to like authority, ***subsequent to the enactment of the said Public Service Commission***

Law, by Chapter 429 of the Laws of 1907, and the revision and amendment thereof by Chapter 480 of the Laws of 1910, and the acts supplemental thereto and amendatory thereof. The said Public Service Commission Law conferred power, and prescribed the manner of the exercise thereof, to regulate and fix reasonable rates of fare to be charged upon *all subway, elevated and other street railroads* in the City of New York. Said Contracts Nos. 1, 2 and 3 were each executed pursuant to the authority of Chapter 4 of the Laws of 1891 as amended; * * *.

It is also the law of the State of New York, *as judicially construed and determined by the Courts thereof*, that the rate regulatory provisions of the law entered *by implication into the terms of the leases, agreements and authorizations* covering the subway rapid transit railroads; that they formed part of the obligations of those instruments, and *that they were notice to the parties thereto that* those instruments were coupled with a provision that the Legislature, in the exercise of its powers, either itself, or acting through another, might regulate the rates thus fixed, and, particularly, with the provision of the statute that *a common carrier such as the plaintiff was empowered to abrogate the same as to the rates stipulated therein* and was allowed by law to put into operation a new schedule of just and reasonable rates and charges to be made for service, upon notice, filing and publication as provided by law" (R. 51-53). A similar allegation was made in reference to the Elevated Extension Certificate (R. 38).

The allegations as to the powers conferred by the Public Service Commissions Law and the law of New York as judicially construed are denied in the City's answer (R. 166, 171, 172). Such allegations are conclusions of law.

The Court below said (R. 1979):

> "If the plaintiff's right to charge a fare in excess of five (5) cents—assuming that rate to be con-

fiscatory—were to be determined solely upon the provisions of contracts #1 and #2, which were made pursuant to specific authority granted by the State legislature to the Board of Rapid Transit Commissioners to contract for a five (5) cent fare, and were such determination to be unaffected by the enactment of the Public Service Commissions Law in 1907, and the execution of contract #3, *the plaintiff would not now be entitled to judicial relief.*"

The verified answer of the defendant, The City of New York, refuting the many misstatements contained in the complaint and supporting affidavits, shows the conduct of the parties, their situation at the time of the contracts, the City purpose sought to be attained, the financial history and other material elements necessarily involved and the conditions in the light of which the contracts were made and must be understood.

San Antonio v. *San Antonio Public Service Company*, 255 U. S. 547, 557;
Paducah v. *Paducah R. Co.*, 261 U. S. 267;
Houston v. *Southwestern Bell Telephone Co.*, 259 U. S. 318, 325.

The Undisputed Facts.

Rapid Transit facilities obtained only by vast sums of public money to effectuate a great City purpose.

The boards.

The development of rapid transit facilities in New York City involved the functions of two separate and distinct public bodies. One of these, originally known as the Board of Rapid Transit Railroad Commissioners, was, in substance, a planning and contracting board. None of its acts, however, was effective unless and until approved by the governing body of the City of New York, in which was vested control over the City's streets and property, the power to appropriate moneys for public purposes, to raise

money by tax, and to pledge the credit of the City. Prior to 1905, some of these powers of the municipality were vested in the common council. Since that date, all have been vested in the Board of Estimate and Apportionment. This is a body of eight elective officers, the Mayor being the Chairman (*Greater New York Charter, Laws* 1901, *Ch.* 466 *as amended*, Secs. 226, 94, 149, 18, 382), chosen pursuant to the local self-government provisions of the Constitution of the State of New York (Art. X, Sec. 2) (*post*, p. 80).

Since 1907, the powers and duties created under the Rapid Transit Act have been vested in a body, which also, for other purposes, possessed regulatory powers, under other statutes. By various legislative devolutions, such regulatory powers since 1924 have been lodged in the *Transit Commission*, which latterly has become a division of the Department of Public Service of the State of New York. *It is in this capacity that it was made a defendant herein* (Complaint III, R. 5). The Transit Commission, however, no longer has any power or duty as a planning or contracting board for the City of New York; its powers under the Rapid Transit Act being limited to supervising and compelling the performance of the contract obligations imposed upon the operators under contracts numbers 1, 2, 3 and 4, and the elevated railroad certificates (*post*, pp. 118, 119).

The City of New York is the principal in all of the Rapid Transit contracts and certificates. The Transit Commission, and its predecessors, in the exercise of the powers and duties created under the Rapid Transit Act, acted as an agency for the city created by the Legislature for such purposes.

The Rapid Transit Act.

Rapid transit has been a matter of great public concern in the City of New York for more than half a century.

Legislation enacted in 1875 was superseded in 1891 by the Rapid Transit Act to bring about an increase in the rapid transit facilities in the City of New York. *It was contemplated that this would be done with private capital.*

Chapter 4 of the Laws of 1891 was entitled "AN ACT to provide for rapid transit railways in cities of over one million inhabitants".

It provided that the Mayor should appoint commissioners of rapid transit, constituting a board of rapid transit railroad commissioners, for the determination of necessity of rapid transit railways and fixing of routes therefor and a general plan of construction showing the general mode of operation. The location of routes was subject to the consent of abutting property owners and of the local authorities (common council) having control of the streets or highways affected (*Secs. 1-4*). After such determination of routes and general plan of construction, the Board was required to transmit a copy to the common council, whose approval was to be deemed the consent of the local authorities of such city (*Sec. 5*).

The Board was then required to prepare detailed plans and specifications, including equipment and safety devices (*Sec. 6*); and to sell at public auction

> "for the account and benefit of said city the right, privilege and franchise to construct, maintain and operate such railway or railways" (*Sec. 7*).

A great City purpose authorized and undertaken.

Referendum on construction at public expense.

All attempts to procure additional rapid transit facilities by private capital having failed, the legislature in 1894 required the Board of Rapid Transit Railroad Commissioners

to cause the question whether such railways be constructed by the city at public expense to be submitted to the vote of the qualified electors of the city. For this new policy appropriate amendments were made in the Rapid Transit Act.

The board of rapid transit railroad commissioners was re-constituted to consist of the Mayor and Comptroller of the City of New York, the President of the Chamber of Commerce of the State of New York, and five persons named in the statute, one of whom was Seth Low (Laws 1894, Ch. 752, sec. 1).

By Section 9 of chapter 752 of the laws of 1894, the numbers of Sections 34, 35, 36 and 37 of the Rapid Transit Act were changed to be 64, 65, 66 and 67; and there was inserted immediately after Section 33, thirty new sections, numbered consecutively from 34 to 63, inclusive.

Contracts required to contain terms and conditions as to rates of fare.

Section 34 (omitting various details) provided (italics ours):—

> "§34. In case the people shall determine by vote as hereinafter provided in sections twelve and thirteen of this act that any such railway or railways shall be constructed for and at the expense of such city * * * the said board, for and in behalf of said city, shall enter into a contract with *any person, firm or corporation*, which in the opinion of said board shall be best qualified to fulfill and carry out said contract, for the construction of such road or roads, upon the routes and in accordance with the plans and specification so adopted, for such sum or sums of money, to be raised and paid out of the treasury of said city, as hereinafter provided, and on such terms and conditions, not inconsistent with the aforesaid plans and specifications, as said board shall determine to be best

> for the public interests. * * * *Such contract shall also provide* that the *person, firm or corporation* so contracting to construct said road or roads shall, at his or its own cost and expense, *equip, maintain and operate* said road or roads for a term of years to be specified in said contract, not less than thirty-five, nor more than fifty years, and *upon such terms and conditions as to the rates of fare to be charged and the character of service to be furnished and otherwise as said board shall deem to be best suited to the public interests, and subject to such public supervision and to such conditions, regulations and requirements as may be determined upon by said board.* * * * Said contract may also provide for a renewal or renewals of the lease of said road upon the expiration of the original term * * *".

Section 12 required the Board of Rapid Transit Commissioners at least thirty days prior to the next general election to file with the Election authorities a request for separate ballots, one-half of which to read: "For municipal construction of Rapid Transit road" and the other half to read: "Against municipal construction of Rapid Transit road." Such Act required the necessary steps to be taken in the conduct of the election and the canvass of votes, and further provided:

> "And the said railway or railways shall be constructed by the said City at the public expense if it shall be found from such statements so filed that there is a majority of the votes so cast in favor of such municipal construction."

It was further enacted in Section 13 that in case favorable action was taken upon such referendum it should

"be the duty of said Board of Rapid Transit Railway Commissioners within thirty days after the official declaration of the said voting to proceed to construct the said railway or railways and to make and let all contracts required for the performance of the work necessary to be done and performed in and about the construction thereof."

Property an inalienable part of City's streets.

Section 63 provided that the roads constructed at the city's expense be and remain an inalienable part of the city's streets (italics ours).

"§63. In case it shall be determined by vote of the people as provided by sections twelve and thirteen of this act, to construct by and at the city's expense, then and in that event the road or roads so constructed *shall be and remain the absolute property of the city so constructing it or them, and shall be and be deemed to be a part of the public streets and highways of said city*, to be used and enjoyed by the public upon the payment of *such fares and tolls*, and subject to such reasonable rules and regulations as may be imposed and provided for by the board of rapid transit railroad commissioners in said city."

As the provisions in sections 34 and 63 were enacted thirteen years before the passage of the Public Service Commissions Law, it would be absurd to say that they had any reference to the regulatory power arising under that act.

Favorable action on referendum.

At the next ensuing general election the referendum received favorable consideration by the electors (R. 177).

Rapid Transit Act constitutional.—The City Purpose.

The constitutionality of the Rapid Transit Act of 1894, then assailed by taxpayers, for the purpose of enjoining the City of New York from employing its funds in the construction of the proposed rapid transit railways, was upheld in all courts.

> *Sun Printing and Publishing Assn.* v. *Mayor, etc., of New York*, 8 App. Div. 230; affirmed 152 N. Y. 258 (decided, 1897).

In the Appellate Division at p. 235, the Court said:

> "The question is thus raised whether a rapid transit railroad, wholly within the limits of a city, is a city purpose. That it is a public purpose does not seem to admit of question. But is it a legitimate city purpose?"
>
> • • • • • •

At page 238:

> "The true test is that which requires that the work shall be essentially public and for the general good of all the inhabitants of the city. *It must not be undertaken merely for gain or for private objects. Gain or loss may incidentally follow, but the purpose must be primarily to satisfy the need or contribute to the convenience of the people of the city at large.*
>
> • • • • • •
>
> The health of the people is dependent in a measure upon decent and convenient transit between their homes and their places of business; not in as great a degree as upon light, air and water, but in no incon-

siderable degree. The scheme under consideration is intended to supply not only rapid, but such decent and convenient transit; to ameliorate the present congestion which at certain hours of each day is fraught with danger to thousands, and to furnish business men and women with the means of reaching their homes at such hours without being crushed in body or worn in nerve.

The question cannot be justly solved without considering the problem which was before the Legislature when it was asked to pass these acts. The court must take judicial notice of the city's history in this regard. We know that relief had been sought through the instrumentality of private adventure, and that capital was not forthcoming. The Legislature had before it this latter crucial circumstance. The need of the people was growing day by day; the hope of relief in the ordinary manner was steadily receding. * * * The present enterprise was demanded of the city by the surrounding conditions. It was a public enterprise. It was not for travelers nor for public travel in the ordinary sense. It was for daily and hourly use in the business and home life of our people. It was entirely within the boundaries of the city. It was primarily for the benefit of its long-suffering inhabitants alone. It was to be open to all these inhabitants at a toll to be fixed by public officials. It was not tainted with even the suggestion of a private character, nor with the purpose of gain. The sole object was public and general locomotion in the locality—locomotion for which there was a crying need—safe, rapid, healthful locomotion; locomotion worthy, in fine, of a civilized metropolis and of a well-governed municipality."

At page 244:

"It is quite immaterial, so far as the question of city purpose is concerned, whether the road shall

be built in one way or in another, or operated in one way or in another. The material fact is, that the road (§63) 'shall be and remain the absolute property of the city so constructing it or them, *and shall be and be deemed to be a part of the public streets and highways of said city,* to be used and enjoyed by the public upon the payment of such fares and tolls, and subject to such reasonable rules and regulations as may be imposed and provided for by the board of rapid transit commissioners in said city.' (Laws of 1891, chap. 4, as amended by Laws of 1894, chap. 752, §9 [adding §63].)

How this latter provision shall be effectuated, whether by a long lease or a short lease, by a lease with this covenant or that covenant, by a lease with or without provision for renewal, by an individual lessee or a corporate lessee, or by no lease at all, but simply by direct municipal service, are mere matters of detail."

At page 248:

"That a city may, in general, lease its property, such as wharves or market stalls, and for a long period, cannot be doubted. We can discern no difference in principle between leasing structures already in existence and contracting with some one to build such structures, paying him for his work, and then permitting him to have the use of them for an annual rental. It can make no difference whether A is the builder and B the lessee, or whether A fills both positions. In fact, by concentration upon a single individual or corporation as contractor first and lessee afterwards, better terms could probably be obtained for the city in both directions."

In the Court of Appeals at p. 273 the Court said:

"The commissioners located the road and tried to induce private capital to construct and operate

it. In this they have failed, and the situation is such that the city must itself construct the road or go without it. Here we have a demand for a great public highway, which private enterprise and capital will not construct. It is necessary for the welfare of the people and is required by them. It is public in character and is authorized by the legislature.

Our conclusion is that, under the circumstances and situation here presented, the proposed road may properly be held to be 'for a city purpose,' and that the acts are not in contravention of the provisions of the Constitution."

Constitution amended to enlarge City's credit.

As a result of the consolidation of various municipalities into Greater New York January 1, 1898 (L. 1897, Ch. 378), and its assumption of their debt, it was found impossible for The City of New York to provide sufficient funds for the construction of new rapid transit railways and for other necessary public improvements. The Legislature thereupon submitted to the People an amendment to the Constitution, so as to exclude from the debt limitations of the City the debts of the separate counties embraced therein; the effect of which was to increase the debt incurring power of The City of New York by about $30,000,000. Such amendment was adopted at the Election held in November, 1899 (Art. VIII, Sect. 10) (R. 179).

Legislature authorizes Rapid Transit Bonds.

Thereafter, the Rapid Transit Commissioners published an invitation to contractors for bids for the construction, equipment and operation of the first municipally constructed rapid transit railway, the bids for which were opened

on January 5, 1900. Before any action could be taken upon such bids, it was found necessary to amend the Greater New York Charter in relation to Rapid Transit bonds which amendment became a law on February 8, 1900 (Ch. 7, Laws of 1900) (R. 179).

Contract No. 1 made with John B McDonald, an individual.

Action was then taken resulting in an agreement dated the 21st day of February, 1900, between The City of New York and John B. McDonald, for the construction, equipment and operation of the Manhattan-Bronx Rapid Transit Railroad, known as Contract #1, a copy of which is annexed to the answer of this defendant marked Exhibit "A" and made a part thereof (R. 179).

John B. McDonald was a *person*, i. e., he was an individual.

We emphasize this fact here because the Rapid Transit Act authorizes a contract with any "*person*, firm or corporation which in the opinion of said Board shall be best qualified" to carry out the City's purpose (*Section 34, supra*, p. 8), while the Interborough Company bases its claim of right to abrogate the fare provisions in the contracts on the allegation that it is a railroad corporation and a common carrier.

Stipulation that contracts be furnished court.

As printing the contracts and elevated railroad certificates and trackage agreements in the record would unduly extend it, it was stipulated that copies be furnished the court (R. 2020, 2021).

Summary of contracts.

Contract #1, although quite voluminous, for the purposes of this appeal, may be summarized very briefly:

It provides for the construction of the railroad described therein at the City's expense. Such construction has long since been finished. Chap. III contains the lease. It provides for service, rental, and a fare of five (5) cents. The term was for fifty years, with a privilege of renewal for twenty-five years.

> "The contractor shall during the term of the lease be entitled to charge for a single fare upon the Railroad the sum of five (5) cents, but not more" (Contract No. 1, p. 123).

Under such contract, the City of New York expended $54,534,594.89 prior to the beginning of this action (R. 740).

Contract No. 2 made with a construction company.

The necessity for additional rapid transit facilities having become evident even before the completion and opening of the Manhattan-Bronx Rapid Transit Railroad (covered by Contract #1), a further agreement was made under date of July 21, 1902, between The City of New York and the Rapid Transit Subway Construction Company, for the construction, equipment and operation of the Brooklyn-Manhattan Rapid Transit Railroad, which said agreement was subsequently known as Contract #2. A copy of such contract is annexed to the answer of this defendant, marked Exhibit "B" and made a part thereof (R. 181).

Rapid Transit Subway Construction Company was a domestic business corporation (*Contract #2*, p. 1). It was not a common carrier or a railroad corporation.

Contract #2 is similar to No. 1, except that the term was thirty-five years, with right of renewal for twenty-five years.

The fare provision is copied *verbatim* from Contract No. 1 (Contract No. 2, p. 107).

Under such contract, the City of New York expended $6,667,517.14 prior to the beginning of this action (R. 740-741).

The Rapid Transit lines constructed under contracts #1 and #2 were opened for operation in October, 1904.

Lease of Elevated.

After certain rights and liabilities under said Contracts #1 and #2 passed by assignment to Interborough Rapid Transit Company, and eighteen months prior to the beginning of operation of any part of said Manhattan-Bronx Rapid Transit Railroad, said Interborough Rapid Transit Company, under effective date of April 4, 1903, entered into an agreement with the defendant Manhattan Elevated Railroad Company, whereby it leased the lines of the latter for 999 years and guaranteed to each of the stockholders thereof a dividend of 7% per annum upon each of their shares of stock in said Company for such period. The capital stock of said Company was and is $60,000,000 (R. 180, 181).

Additional facilities necessary.

It soon became evident that the rapid transit facilities provided under contracts #1 and #2 were wholly inadequate for the City's then present necessities and future growth.

Neither contract #1 nor #2 contained any provision obligating the Interborough to operate additions or exten-

sions to the lines included therein, as they might be constructed by the City, upon terms to be specified (R. 186). The public authorities were therefore left to persuasion as the only means of procuring new facilities.

Equipment at public expense and Municipal Operation authorized. All Rapid Transit policies to be determined by Board of Estimate and Apportionment.

Previous to 1906 the Rapid Transit Act contained no provision authorizing the direct municipal operation of rapid transit lines, the referendum of 1894 having been limited to municipal construction, with contract operation.

By Ch. 472 Laws of 1906, important changes were made in the Rapid Transit Act. In all of these changes the place of the City of New York, and particularly that of its governing body, the board of estimate and apportionment was emphasized.

The city was empowered to engage in municipal operation without the necessity of engaging a contractor, *if in the opinion of the Board of Estimate and Apportionment such action were deemed advisable.*

Sec. 34 was amended by eliminating the provisions that a contract for the construction of a rapid transit railroad with municipal funds should include a requirement that the contractor having the *construction* contract should also *equip, maintain* and *operate* such road.

At the end of the section, there was added a provision that

> "The said board of rapid transit railroad commissioners may also provide for the *equipment at public expense* of such railroad or railroads * * *.

Five new sections were then inserted in the act, known as numbers 34-a, 34-b, 34-c, 34-d and 34-e.

Sec. 34-a related to a contract for *equipment, maintenance* and *operation.* It provided (italics ours):

> "Section 34-a. The board of rapid transit railroad commissioners shall, *subject to the approval of the board of estimate and apportionment,* or other analogous local authority of such city, have full power and authority to provide for the *maintenance, supervision, care and operation* of the railroad • • • constructed or to be constructed for and at the expense of such city pursuant to the provisions of this chapter, and may, *with like approval,* enter into a contract with *any person, firm or corporation* who or which in the opinion of said board of rapid transit railroad commissioners shall be best qualified to fulfill and carry out said contract, for the *equipment* or any part thereof not provided for pursuant to the next preceding section of this act, of such road or roads, at his or its own cost and expense, and for the *maintenance and operation* of such road or roads for a term of years to be specified in said contract and not to exceed twenty years. *Every such contract shall contain such terms and conditions as to the rates or fare to be charged and the character of services to be furnished and otherwise as said board of rapid transit railroad commissioners shall deem to be best suited to the public interests, and subject to such public supervision and to such conditions, regulations and requirements as may be determined upon by said board, with like approval.*"

• • • • • •

Section 34-b provided for *equipment* at public expense and for *maintenance and operation* by contract (italics ours):

> "*If in the opinion of the board of estimate and apportionment,* or other analogous local authority of such city, a contract for the equipment, maintenance

and operation as provided for in the preceding section shall be inexpedient, impracticable or prejudicial to the public interest, the board of rapid transit railroad commissioners may, *with the approval of the board of estimate and apportionment* or such other analogous local authority, *equip* the said road or roads in whole or in part, for and at the *public expense* • • • and enter into a contract *with any person, firm or corporation* • • • for the *maintenance and operation* of such road or roads for a term of years to be specified in said contract, and not to exceed ten years."

The provisions of the preceding sections for fare and service were to apply to such a contract.

Section 34-c related to assurances and security.

Section 34-d provided for direct *municipal* maintenance and operation (italics ours):

> §34-d. *If in the opinion of the board of estimate and apportionment*, or other analogous local authority of such city, either a contract for equipment, maintenance and operation, or a contract for maintenance and operation as provided for in the preceding sections would be inexpedient, impracticable or prejudicial to the public interest, the board of rapid transit railroad commissioners shall forthwith devise and prepare a plan for the maintenance and operation of such road or roads, *and when said plan shall have been approved by the board of estimate and apportionment*, or other analogous local authority of such city, the said board of rapid transit railroad commissioners shall *maintain and operate* such road or roads for and on behalf of said city.

Under municipal operation rates were to be adjusted and readjusted from time to time so as to furnish service at cost.

Merger of rapid transit and street railway corporations followed by no bids for operation of new city-built rapid transit lines.

About this time persons interested in Interborough Rapid Transit Company and Metropolitan Street Railway Company, a corporation owning or controlling an extensive system of street surface railways in New York City, procured the organization of a new corporation known as Interborough-Metropolitan Company, which by issue and exchange of its securities for those of the two former companies acquired control of all of the rapid transit facilities in Manhattan and the Bronx, part of those in Brooklyn and a large part of street surface railway facilities in Manhattan (R. 182).

In the spring of 1907 the Rapid Transit Commission asked for bids for certain new rapid transit routes. Their determination to do so followed intimations from the Interborough and Metropolitan interests that they would be interested in additional subway construction. The merger of the two interests having taken place before the time for the taking of bids, no bids were received. The Interborough wrote the Commission that increased cost of construction was the reason of its failing to bid; although it is to be noted that the cost of construction was to be paid from municipal funds (R. 216).

Although expressly empowered by the amendment of 1906, the municipal authorities were reluctant to embark upon a program of municipal operation, and no headway was made in the provision of the admittedly necessary facilities.

Public Service Commissions Law.

In 1907, the New York Legislature enacted the Public Service Commissions Law (Chap. 429 of the Laws of 1907).

The Act created two Public Service districts, known as

the "First District" (which comprised New York City), and the "Second District" (which included the remainder of the State). It provided for a Commission of five members for each district.

It made no changes in the Rapid Transit Act, except that all of the powers and duties theretofore conferred upon the Board of Rapid Transit Railroad Commissioners under the Rapid Transit Act (which was continued in force) were transferred to the members of the Public Service Commission, for the First District (New York City), to be exercised, in addition *but not subject* to the powers and duties conferred upon them by the Public Service Commissions Law for other purposes. This accounts for the fact that thereafter, in dealing with Rapid Transit matters, the Rapid Transit planning and contracting body is referred to as the Public Service Commission.

Rapid Transit Act revised and City's power enlarged.

By Chap. 498 of the Laws of 1909, the Rapid Transit Act was amended generally. In fact, it amounted to an entire revision thereof, as it repealed all prior provisions not included in the amended act.

Many sections were superseded and repealed; others were renumbered with verbal changes, such as substituting "Public Service Commission" for "Board of Rapid Transit Railroad Commissioners" where the transfer of the powers and duties under the Rapid Transit Act necessitated such changes in the context.

Aside from such changes the most important amendments were those authorizing the insertion in new franchises and contracts of provisions for their termination, and for the recapture by the City of rights and property

involved in such grants, by giving a specified notice and the payment of cost plus fifteen (15) per cent (*Sections* 23, 24, 27).

But the provision, first appearing in Section 34 as added by Chapter 752 of the Laws of 1894 (amended by L. 1906 ch. 472 to require approval of Board of Estimate and Apportionment), *and continued in all subsequent amendments and revisions, in relation to fares and service* in "a contract with *any person, firm or corporation*", *was re-enacted* in the following form (brackets indicating eliminations and italics new matter):

> § [34-a] *27. Contract for equipment, maintenance and operation of road.*
>
> "*1.* The [board of rapid transit railroad commissioners] *public service commission* shall, subject to the approval of the board of estimate and apportionment, or other analogous local authority of such city, have full power and authority to provide for the maintenance, supervision, care and operation of the railroad or railroads • • • constructed or to be constructed for and at the expense of such city pursuant to the provisions of this chapter, and may, with like approval, enter into a contract with any person, firm or corporation, who or which in the opinion of said [board of rapid transit railroad commissioners] *commission* shall be best qualified to fulfill and carry out said contract, for the equipment, • • • maintenance and operation of such road or roads • • •.
>
> "*2.* Every such contract shall contain such terms and conditions as to the rates of fare to be charged and the character of services to be furnished and otherwise as said [board of rapid transit railroad commissioners] *commission* shall deem to be best suited to the public interests, and subject to such

public supervision and to such conditions, regulations and requirements as may be determined upon by said [board] *commission*, with like approval" * * *.

This latter expression "with like approval" relates back to the opening sentence of the section:

> "The public service commission shall, *subject to the approval of the board of estimate and apportionment*"

have power to enter into a contract for the equipment, maintenance and operation of the road.

The re-enactment of this provision certainly indicates no change of legislative attitude toward Rapid Transit contracts.

To Section 37 there was added a new provision in relation to the construction of rapid transit lines as local improvements, to be paid for by assessment upon property benefited.

Section 63, that the city's property be an inalienable part of the city's streets, was re-enacted with mere verbal change as follows (brackets indicating omissions and italics new matter):

> "§63. *Proviso in case road constructed by city.* [In case it shall be determined by vote of the people as provided by sections twelve and thirteen of chapter seven hundred and fifty-two of the laws of eighteen hundred and ninety-four to construct by and at the city's expense] *Any railroad or railroads,* [then in that event the road or roads] so constructed *by and* at *the city's expense* shall be and remain the absolute property of the city so constructing it or them, and shall be and deemed to be a part of the public streets and highways of said city, to be used and enjoyed by the public upon the payment of such

fares and tolls, and subject to such reasonable rules and regulations as may be imposed and provided for by the board of rapid transit railroad commissioners in said city *or by the public service commission.*"

Section 65, the "Repealing Clause", provided as follows:

"§65. Repealing clause.—*All acts and parts of acts, local or general, inconsistent with this act are hereby repealed.*"

At the 1910 session of the legislature, the fare and service requirement of the Rapid Transit Act, which in the amendment of 1909 was renumbered as subdivision 2 of section 27 was further amended by adding at the end thereof a provision that a contract may contain a reservation of trackage rights, and as so amended it was re-enacted without other change (Chapter 504 Laws of 1910).

Three years of intense struggle for Rapid Transit facilities to attain a greater city purpose.

From June 10, 1910, to March 19, 1913, on which date the Dual Subway Contracts and the various Elevated Railroad Certificates and the Trackage Rights and other agreements were authorized and executed, negotiations and bargaining between the municipal authorities and different railroad interests were arduous and continuous (R. 665).

Interborough insistent upon contract for operation of new facilities at five-cent fare.

During this period and under the state of law above indicated, the Interborough Company persistently solicited from the City an agreement for construction and/or operation of new facilities upon terms most favorable to the Interborough *but always specifying a five cent fare as a fundamental term of the contract sought.*

The first solicitation by the Interborough Rapid Transit Company for additional rapid transit facilities appearing in the record is dated June 10, 1910 *three years after the enactment of the Public Service Commissions Law.* It opens with the proposal for the third-tracking and extensions of the Second Avenue Elevated, coupled with the statement that it will

> "afford the citizens of Queens the benefit of free transfers *upon the payment of a single five-cent fare,* to *all parts* of the elevated system in Manhattan and The Bronx" (R. 190, 191).

It concludes with reference to the Steinway Tunnel, concerning which it says:

> "An additional line of rapid transit communication will thus be established, with free transfers, *upon the payment of a single five-cent fare,* between Long Island City and *all parts* of Greater New York reached by the existing subway lines" (R. 194, 195).

The next solicitation by the Interborough Rapid Transit Company was dated December 5, 1910 (R. 194) and proposed the construction of main subway trunk lines and branches in Manhattan, Brooklyn and the Bronx, which

> "when constructed and equipped will be operated by the Interborough Company *as parts of the existing subway system, with a single five-cent fare* and free transfers" (R. 196).

The Interborough also sought to operate a new subway in Brooklyn, then in course of construction by the City, at public expense, and which the Interborough proposed to operate

> "when completed, as part of the present subway system *for a single five-cent fare*" (R. 199).

In summarizing the advantages of its proposals, the Interborough stated:

> "Citizens of Brooklyn, Manhattan, Queens and the Bronx may be transported upon the enlarged subway system which may best be described as a *four*-borough system, *to any point*, including the shopping and theatre districts of Manhattan, for a *single five-cent fare;*" (R. 201).

The term of the lease proposed by the Interborough was 49 years (R. 199).

Brooklyn Rapid Transit Company having made a formal proposal on March 2, 1911 (R. 325), the Interborough Company under date of May 9, 1911, submitted a further proposal, supplementing, explaining and expanding its prior proposals and stating that it proposed "certain *contractual* limitations upon future profits" and that:

> "if the public authorities prefer an offer upon the basis of the terms recently proposed to the City by the Brooklyn Rapid Transit Company, the Interborough Company, upon those terms, will undertake to build any road in any of the *five* boroughs that the public authorities may designate, including one or more through lines to Coney Island and Staten Island, and operate them all in connection with the present subway system for a *single five-cent fare*" (R. 350).

Enlargement of the City purpose for Greater New York.

Contract No. 1 contemplated provision for the *old* City of New York, comprised mainly within the Island of Man-

hattan; the consolidation of various municipalities into the Greater City of New York having been under way at the time of the *Sun* case litigation, becoming effective January 1, 1898.

One of the immediate necessities for Contract No. 2 was to extend relief to the Borough of Brooklyn (formerly the City of Brooklyn), by continuation of the road constructed under Contract No. 1 from the old Post-Office Building in Manhattan, under the East River, to the business section of Brooklyn, where access could be had by various transportation facilities; the growth of the City and its population having become so great that the ferries and bridges across the East River had become utterly inadequate.

The purpose of the dual contracts, known as contract No. 3 and contract No. 4 (the latter with the Brooklyn Rapid Transit Company) was to enlarge and expand rapid transit facilities so as to make provision in the whole of the Greater City of New York. The record clearly reveals this purpose.

At a public hearing on June 22, 1911, at which Mayor Gaynor presided (R. 399), Hon. Seth Low appeared representing the public (R. 421). He had formerly been mayor of Brooklyn; he was a member of the first Board of Rapid Transit Railroad Commissioners; he was mayor of the Greater City of New York when Contract No. 1 was executed; and afterwards he was president of Columbia University.

In urging action for immediate relief he made an extended statement (material parts of which appear at R. 422-426), in the course of which he said (R. 422):

> "Two qualities stand out in the report that ought to command the enthusiastic approval of the citizens. The first is a most painstaking desire to secure for the City a comprehensive system of rapid transit,

with an eye not only to the present but also to the future, upon terms which, in the long history of the City, will *make its rapid transit system of the maximum value of a distributor of population.*

• • • • •

The report recognizes, also, that the East River Bridges in which the City has invested $80,000,000, should be used as thoroughfares, and not for shuttle trains, and provides for this larger and better use. The second quality is the evident intention of the Conferees to be absolutely just in their recommendations as between the City and the private enterprises affected • • • but nobody disputes that the rapid transit development which the Conferees are endeavoring to make possible for the City is a comprehensive system and entirely worthy of The City of New York. No one disputes, or can dispute, that such a development if obtainable, *would tend to distribute the present and future population of the City as fairly as possible through all the Boroughs of the City;* for the plans not only make provision for immediate construction, but they provide for the construction of desirable additions from time to time, as circumstances may require (R. 423).

• • • • •

It may be objected that such action carries with it:

First—Upon the face of the proposal, a five-cent fare over *two* separate systems, instead of a five-cent fare for a *single* system, thus possibly hazarding the ultimate acquirement of a five-cent fare, with universal transfers, over the whole City (R. 424)."

Six days later, on June 27, 1911, in the midst of some of the most arduous of these negotiations, Interborough Rapid

Transit Company suddenly rejected all of the proposals theretofore tentatively agreed upon and withdrew all of the offers theretofore submitted by it, with the single exception of one dated June 10, 1910, with respect to elevated improvements and the operation of the Belmont Tunnel, which it was well aware contained terms that the City could not accept (R. 446, 454-456).

Interborough's further proposal, resulting in Contract No. 3 and Elevated Certificates.

So far as the Interborough Rapid Transit Company was concerned, nothing came of the matter for several months; in fact it moved only when it began to fear that the contracts for all new lines might go to its Brooklyn competitor.

A further proposal of the Interborough Company was submitted under date of February 27, 1912 (just in time to prevent the operation of all the new lines to be constructed by the City, being awarded to Brooklyn Rapid Transit Company, R. 576). Such proposal is printed in the record at pp. 545-564. It is a renewal and expansion of all prior proposals, with many modifications and qualifications far more favorable to the City than any theretofore put forward by the Interborough Company.

This offer is too lengthy to repeat here, but there are certain features that invite attention.

> "In order that there should be before the public authorities a complete statement of the subway and elevated extensions and improvements concerning which the Interborough Rapid Transit Company is prepared to enter into a contract with the city, the following offer is submitted on the company's behalf:
>
> The Company will accept the lines assigned to it by the city in the Joint Transit Conferees' report in the Summer of 1911, and will, under the terms hereinafter

stated, construct, contribute to the construction of, equip and operate such new subway lines, and construct, equip and operate the third-tracking, improvements and extensions of the elevated railroads as follows:

I. Subway Lines."

[Here follows description of lines] (*R.* 546).

"II. Elevated Lines, Third-Tracking, Improvements and Extensions."

[Here follows description] (*R.* 548).

"Forty-nine Year Lease.

4. The new lines will be *operated* by the Interborough Company *under a contract with the city* which will extend over a period of forty-nine years from the time when the new subways are put into complete operation" (*R.* 551).

• • • • • •

"Five-Cent Fares.

11. All the foregoing subway lines will be operated by the company in connection with the present subway lines for a single fare of five cents" (*R.* 554).

• • • • • •

The proposal of the Interborough stated that $6,335,000 was

> "the average annual income from operation of the existing subway lines and equipment for the two fiscal years ending June 30, 1911" (*R.* 555).

It insisted that the contract make this product of the five cent fare a preferential annual charge in its favor on the earnings of the new and old lines (R. 554, 555).

Contracts Nos. 1 and 2 and the proposed new contract were all to be made to terminate at the end of 49 years. The preferential of $6,335,000 per year demanded by the Interborough was "for *each* of the said forty-nine years" (*R.* 555).

This proposal was accompanied by a communication dated the same date, to which was attached a schedule showing its net earnings under contracts numbers 1 and 2 were $6,335,000 per year, for the two fiscal years ending June 30, 1911 (R. 545). In this communication the Interborough gave notice that it reserved the right to submit

> "to the proper court the *determination of any and all questions regarding the legal validity and sufficiency* of the formal contract to be made" (*R.* 544-545).

Interborough tests validity in taxpayer's action.

When all the terms of the new contract had been agreed upon, the Interborough financed a taxpayer's action to determine the validity of the proposed contract, in conformity with its previous declaration (*Admiral Realty Company* v. *City of New York*, 206 N. Y. 110). This is admitted in the reply of the Interborough (*R.* 761) to the allegations in "QQ" of the City's counterclaim (*R.* 746, 749).

Special Legislative Sanction.

It appearing that a basis for an agreement with the Interborough finally had been reached, and that it was necessary that the Rapid Transit Act should be amended so as to expressly authorize the novel features of such

new agreement, a bill for that purpose was introduced in the New York State Legislature.

On March 21, 1912, the Board of Estimate and Apportionment unanimously adopted the following resolutions (R. 565):

> Whereas, The Public Service Commission for the First District and the Board of Estimate and Apportionment of The City of New York have under consideration plans for the construction and operation of a system of subway and rapid transit lines that will extend rapid transit facilities to *every part of the city* and secure to the people an extension of service that will increase three fold the area throughout which passengers *may be carried for a single five-cent fare; and* • • •
>
> Whereas, There is now pending before the legislature an act amendatory of the rapid transit act, *prepared by the Public Service Commission and designed to permit the public authorities to enter into contracts* for the construction, equipment and operation of rapid transit lines in accordance with the plans aforesaid, and upon the best possible basis to be secured to the city; and • • •
>
> Whereas, The failure of the passage of the said act would leave the rapid transit situation in confusion and put off indefinitely the relief for which the people of the city are waiting; now, therefore, be it
>
> Resolved, That the Board of Estimate and Apportionment of the City of New York earnestly urges upon the legislature the importance of the prompt passage of Senate Bill No. 1277, amending the rapid transit act and introduced by Senator Wagner on March 18th; and be it further
>
> Resolved, That the Secretary be directed, on behalf of this board, to forward copies of these resolutions to the President of the Senate and the Speaker of the Assembly, and that the Corporation Counsel

be requested to represent this board at such hearings as may be given upon the bill in either house (R. 566).

Among such amendments was the provision that *such contract* may authorize the retention by the Interborough

"for *each year of the term of such contract*"

of the preferential of $6,335,000 per year (Sec. 27, subd. 2).

The Wagner Bill became a law as Chap. 226 of the laws of 1912.

Subway additions.

The provisions in Contract No. 3 which required express legislative sanction are covered by the Amendments to Section 27 of the Rapid Transit Act. The Amendments in relation to recapture are in Subdivision 1 of Section 27. A new Subdivision 2 authorized the leveling of existing leases and the so-called "Exchange of Legs" in case of recapture; and a further provision therein authorizes the deduction from revenues by the Interborough, of the so-called preferential of $6,335,000.00 per year; 6% per annum upon the investment of the Interborough, including brokerage charges not exceeding 3% (*ib.*) and the annual expense or cost of the contractor plus 1% per annum on the contractor's investment in betterments or improvements with provision that all of such annual payments shall be cumulative (*ib.*).

We quote from the new subdivision of Section 27:*

> "The contract between the city and such corporation may also provide that in consideration of the operation of the railroads specified as provided for

* Note.—Section 27 is printed in full in the record, extending over pages 1032-1045.

in such contract and the said railroad or railroads theretofore constructed in whole or in part at public expense in connection with each other for a single fare, and of the payment by said company of moneys to be applied as hereinafter authorized to or toward the construction by the city of the road or roads to be maintained and operated under such contract, and in further consideration of any covenants or agreements by the company to modify the term or terms of its leases or to waive or modify any of the other provisions of its contract or contracts, the gross receipts of the operation of such railroads theretofore constructed and of such road or roads of the city to be maintained and operated under such contract may be combined during the term of such contract, and that the city shall receive for the use of its said additional road or roads at intervals named a specified part or proportion of the income, earnings or profits of the railroads whose receipts are so combined,[5] and in such case the contract may apportion out of the amount so to be received by the city and specify a portion thereof which shall be deemed to be the rental for the use of each of the roads of the city maintained, equipped and operated under said contract.[6] Any such contract shall provide for determining the amount of income, earnings or profits of the railroads whose gross earnings are so combined, and for such considerations may authorize the retention by the said railroad corporation for each year of the term of such contract, prior to the payment of any sums or of any part or portion of the income, earnings or profits to the city as rental for the use of the roads specified or provided for in such contract,[7] of (a) a specified sum of money, which sum

[5] Pooling of revenues.
[6] No rental except a possible share in earnings.
[7] City's rights to return on investment subordinated.

may represent the average annual income from operation of the said railroad or railroads theretofore constructed and operated by such corporation for any two or more years;[9] (b) a sum not exceeding six per centum per annum for each year upon the investment of the said company including brokerage charges not exceeding three per centum, in the construction and equipment of the said road or roads of the city to be maintained and operated under such contract;[9] and (c) a sum not exceeding the annual expense or cost to the contractor plus one per centum per annum on account of the contractor's investment in betterments or improvements upon or additions to such road or roads and equipment.[10] Such contract may also provide that such annual payments shall be cumulative, and that any deficiency with respect thereto shall be paid off and discharged annually out of said gross receipts *before any payments by way of rental or compensation for the use of such roads shall be made to the city.*"

Fare and service requirement re-enacted.

Former subdivision 2 of Section 27 was renumbered 3 and re-enacted as follows:

"3. [2] Every such contract shall contain such terms and conditions as to the rates of fare to be charged and the character of services to be furnished and otherwise as said commission shall deem to be best suited to the public interests, and subject to such public supervision and to such conditions, regulations and requirements as may be determined upon by said commission, with like approval."

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[9] Interborough's preferential of $6,335,000 per year.

[9] Payment of Interborough investment with interest and profit.

[10] Interborough's participations, cumulative and prior to City.

The provision in contract No. 3 insisted upon by the Interborough was that

> *"during the term of the contract"*

it should be entitled to charge for a single fare

> *"the sum of five (5) cents but not more"* (*Contract No. 3, Article* LXII).

The term of the contract fixed in a preceding article was 49 years, subject to earlier termination by recapture (*Article* XLVII).

The preferential of $6,335,000 per year for 49 years, the *product of the five-cent fare*, was acceded to by the public authorities because,

> "The present earnings of the company cannot be taken away from it"

and it was therefore entitled to the

> "continued allowance of the profit it is receiving today" (*R.* 617, 616).

It is not open to doubt or discussion that the Interborough Company bargained for and obtained a right by contract to charge a fare of

> "five (5) cents, but not more",

for 49 years subject to recapture, and for a like period, the right to exact as a preferential the otherwise wholly unreasonable and excessive profit of $6,335,000 per year produced by the five-cent fare under contracts Nos. 1 and 2.

Elevated railroad certificates.

The elevated railroad improvements were authorized under Sec. 24 of the Rapid Transit Act, as amended by the

Wagner bill. This amendment will be found in subdivision 1 of Sec. 24 and in subdivision 6 of Sec. 24 of the Rapid Transit Act.

By subd. 4 of Sec. 24 (which was retained in its original form without amendment by the Wagner bill) it is provided (italics ours):

> "The certificate or certificates prepared by the commission as aforesaid when delivered and accepted by such person, firm or corporation *shall be deemed to constitute a contract between the said city and said person, firm or corporation according to the terms of the said certificate;* and such contract shall be enforceable by the commission acting in the name of and in behalf of the said city or by the said person, firm or corporation according to the terms thereof, but subject to the provisions of this act."

Among the terms included in the Elevated Railroad Certificate granted to Interborough Rapid Transit Company was that for a five (5) cent fare, contained in Article VI (*post*, pp. 175-176). These provisions are discussed hereafter in connection with the elevated railroad certificates (*post*, p. 169).

The great City purpose of the contracts.

The objective sought to be attained and the municipal policy underlying the agreements as finally agreed upon, the negotiation of which had involved so much time and effort, have already been indicated herein but are more fully explained in the report of its transit committee, which was approved by the vote of all but one of the members of the Board of Estimate and Apportionment from which we extract the following (R. 576) (italics ours):

"Character of the Dual System Proposed.

Throughout the negotiations that have led to the presentation of the pending plans, the Public Service Commission and the members of your Committee have kept in mind the need of providing not merely a series of roads for the convenience of the travelling public, but *a basis for the future development of the city, along logical and well-ordered lines.* The need of a system that will serve this purpose need not be argued. *The present congestion of traffic upon all rapid transit lines is great, and the lack of facilities for distributing population through sections that offer an abundance of opportunity for home building and other development, within comparatively short distances of the center of the city, is also clearly apparent.* * * * **The city's prime interest in the building of new transit lines is not, in short, to make money through successful railroading, in the commercial sense, but to lay a basis for city expansion and city growth.**

The conferees have also been convinced that the best interest of the city will not be served if new rapid transit lines are built only where they will yield an immediate profit from operation. The single offer for construction and operation pending at the time your Committee was appointed, that of the Interborough Company dated December 5, 1910, was framed upon this principle. *It has been the conviction of the conferees that it is far better to establish a system that will penetrate to all parts of the city at approximately the same time, in this way compelling the richer short haul lines to support the less profitable extensions, and, incidentally, keeping the development of outlying localities in all of the boroughs in a proper state of balance.* It is their belief that the creation of such system, having in it as well in an important degree the element of competition,

will amply justify the cost to the city of carrying such incidental deficiencies as may occur in the earlier years of operation. It is, however, also their opinion that the period of deficiencies will be brief, and that if the plans now pending be adopted the city will within a few years realize a sufficient margin of profit to exempt its entire new investment from the constitutional debt limit. Through this and other means, the city will, after the statutory period of ten years has passed, assume an absolute control of the new lines now to be built, and of all future extensions; reserving the right to recapture any or all of them for combination in an independently operated or municipally operated system, whenever the taking of either course might seem wise" (R. 576-579).

• • • • • •

"Instead of three or four separate systems, it has seemed better to so group the lines, new and old, that all would come within two great systems, *each offering within its bounds universal carriage or transfer for a five-cent fare*, and so adjusted that together, *they will bring the benefits of the five-cent fare zone to all but a slight percentage of the people who ride*" (R. 580).

• • • • • •

"Operating Terms.

The operating and financial terms proposed for the contracts under consideration have been revised in various particulars, and at various times, since the joint report of the Conferees to the Board of Estimate and Apportionment. It will, no doubt, aid the Board in its consideration of the whole matter and afford a more definite basis for its present action, if these terms are restated. They are as follows:

Terms Applying to Either Operating Company. Rate of Fare—

(1) The rate of fare for one continuous ride over any part of the system operated by either operator, including transfers, is to be five cents" (R. 588).

• • • • • •

"*Terms Applying to the Manhattan Elevated Lines. Rates of Fare—*

(1) The rate of fare over any part of the Manhattan elevated system with its proposed extensions is not to exceed five cents" (R. 604).

Upholding of Rapid Transit Act amendments and contracts by Court of Appeals, followed by formal acts of authorization and execution.

The Court of Appeals having sustained the legality of the amended Rapid Transit Act and the proposed contracts and certificates (*Admiral Realty Co.* v. *City of New York*, 206 N. Y. 110), on March 6, 1913, the Board of Estimate and Apportionment received from the Public Service Commission a communication transmitting "for appropriate action under the Rapid Transit Act" the dual subway contracts, elevated railroad certificates, and joint trackage agreements comprised in the entire transaction (R. 662-663).

> "The contracts and agreements to become effective will require the approval and consent of the Board of Estimate and Apportionment; the certificates will require the approval of your Board *and in addition the consent of your Board and of the Mayor, as the local authorities*, to the construction and operation of the railroads therein described.
>
> In view of the extended conferences with your Committee on Pending Transit Proposals and of the widespread discussion of these matters, it is unnecessary here to recite the various provisions of these

documents or to declare the public policy that underlies them. *The documents are the result of nearly five years of negotiation, actively participated in by your committee since its appointment two years ago.*"

On March 18, 1913, appropriate resolutions were adopted by the Board of Estimate and Apportionment approving the execution of the various contracts, giving the certificate consents and granting the accompanying certificates (Answer, R. 674-723).

Summary of Contract No. 3.

The fare provision contract No. 3 is quite simple and unequivocal:

> "The lessee shall *during the term* of the contract *be entitled* to charge for a single fare upon the Railroad and the Existing Railroads *the sum of five (5) cents, but not more*" (Art. LXII).

In its provisions for financing the cost of construction and equipment, the repayment of advances to the Interborough Company, the disposition of earnings, recapture, and other subjects, Contract #3 is quite complex.

It provides for certain specific modifications of contracts numbers 1 and 2, hereinafter more fully discussed.

Interborough Rapid Transit Company provided certain moneys toward the cost of construction and furnishing of equipment under this contract. The moneys so provided are to be repaid with interest and profit. The obligation to repay is not a debt of the City of New York. Such an obligation would have been in excess of its then debt incurring power. The method agreed upon, therefore, was for the Interborough Company to "contribute" toward the cost of

construction and to equip the railroad (Art. VII, IX, XII, XIII). *Title to such equipment vested in the City of New York upon delivery* (Art. XXXVIII). *The Interborough Company acquired no interest in or lien upon any of the property or equipment.* For repayment of its outlays toward construction and equipment, interest thereon and profit, *it was given a charge upon earnings.* From earnings it is allowed to deduct 6% per annum on $80,000,000 (Art. XLIX, 7). For outlays in excess of $80,000,000, it is allowed to deduct the actual rate of interest paid by it in borrowing such monies, plus 1% per annum (*ib.*, 8). These deductions were to be made quarterly during the term of the lease (Art. XLIX). The 1% deduction is for the redemption of its bonds and profit. The 6% deductions included 5% for interest and 1% for return of principal and profit (*ib.*, 7, 8, 9).

To the extent of $80,000,000, the then foreseeable sum to be contributed or furnished, the Interborough was to finance its requirements by the issue of 5% bonds (R. 700). As to outlays to be made in the more remote future, arrangements for which could not be anticipated, it was to obtain money at the market price and be reimbursed at the same rate of interest. In both cases, however, the return of principal and payment of profit thereon was by the receipt of 1% per annum, payable quarterly for the term of the lease (*ib.*).

It is to be observed that the deduction of 6% proceeds on the entire principal sum for the entire term of the lease, notwithstanding such principal is continually being reduced by the annual 1% deductions from revenues. The effect of this is that interest is collected each year during the full term of the lease on the original principal, notwithstanding the annual reduction of principal.

To illustrate; at the end of the 25th year more than one-fourth of the principal would be repaid, yet interest would be received on the whole of it until the term of the lease expires.

Similarly the receipt of 1% per annum payable quarterly to extinguish the principal and for profit, produces a sum materially in excess of that actually laid out by the Interborough.

$113,383,846 profit for Interborough in addition to preferential.

The total profit to the Interborough from excess allowance of interest, during the term of the contract, is $21,106,576. The total profit on excess return of principal is $92,247,270; making the total profit under these provisions of the contract $113,353,846. These figures are explained in detail under Point VII (*post*, pp. 159-161).

The new lines, upon completion, were leased to the Interborough Company for operation for 49 years subject to earlier termination by recapture (Art. XLVII). *No rental is to be paid by it for the use of such new lines* (Art. XLIX). The receipts and expenses of the new lines are to be combined or consolidated with those of lines operated under contracts numbers 1 and 2 (*ib.*). From such gross revenues, the Interborough Company is to deduct and retain sums sufficient for the following purposes:

Rentals (on lines under Contracts #1 and #2), taxes (of all kinds), operating expenses, maintenance, depreciation, a preferential of $6,335,000 per year, its charge for interest on and reimbursement of and profit on $80,000,000, and upon any expenditure for additional equipment costing in excess of such sum (*ib.* 1-9).

After such deductions for its own purposes, Interborough Company is to deduct 8.76% on the cost of construc-

tion paid by the City of New York, which it is to pay over to the City in lieu of rentals (*ib.*, 10). If earnings are insufficient in any quarter to meet any of such deductions, the deficit is to be cumulative, with interest, and have priority over subsequent items (Art. LI). As the deductions for Interborough purposes are prior to the deductions for city purposes, the city can obtain no portion of its stipulated 8.76% until all accumulated Interborough deductions have been satisfied. Any excess of earnings over such cumulative deductions for the Interborough and the City is to be deemed profits (Art. XLIX, 13) and to be divided equally between the Interborough Company and the City of New York (Art. L).

Two of the foregoing deductions require explanation, namely, the preferential of $6,335,000 per year, payable to the Interborough Company, and the 8.76% payable to the City of New York on its cost of construction.

Interborough's preferential of $6,335,000 per year.

In its proposal (R. 545, 555) the Interborough Company thus described its preferential (italics ours):

> "(b) A sum, to be paid to the company out of such gross receipts for each of the said forty-nine years, *to represent the average annual income from operation of the existing subway lines and equipment for the two fiscal years ending June 30, 1911, which is $6,335,000*, as compensation for the pooling of the receipts of the existing subway and equipment with those of the new subway lines and equipment; for the leveling of the leases of the existing subway and the exchange of the legs; for services in connection with the operation of the property; and for the company's agreement to furnish to the extent hereinafter provided, one-half of the cost of the construction of the proposed new subways, and the entire cost of the equipment thereof" (R. 555).

The report of its committee to the Board of Estimate and Apportionment clearly shows that that body and the Interborough were agreed that

> "the present earnings of the Company can not be taken away from it" (R. 617).

Therefore the City of New York in order to lay out the new lines for Interborough operation had to consent to the

> "continued allowance of the profit it is receiving today" (R. 616).

Return of 8.76% on City's outlays based on theoretical equalization with Interborough, but subordinate to it.

It was asserted that the Interborough had an investment of $48,000,000 under contracts #1 and #2; and that on such claimed investment its annual return ($6,335,000) was 13.2% (R. 617); and that by adding to $6,335,000 the carrying charges on the sums to be procured and advanced by it the annual yield to the Interborough would be 8.76% on the total (R. 617). On such assertion it conceded to the City of New York the right to receive, if earned, "*after the payment of the foregoing obligations to the Company*", an amount equal to 8.76% upon the City's investment in the new lines (R. 557).

A highly profitable contract.

While the asserted claim of its investment of $48,000,000 under contracts #1 and #2 is easily shown to be without substance (R. 503, 504), it is a fact that *inasmuch as the monies advanced by the Interborough under contract #3* are repaid with interest and profit through the charge on earn-

ings, it continues to receive for forty-nine years by reason of the preferential of $6,335,000, an annual return of 13.2% on its claimed investment under contracts #1 and #2, besides the profit of $113,353,846 for excess allowances for interest and return of principal under contract #3. The City does not concede moreover that the Interborough has invested $48,000,000 under contracts #1 and #2. If a single item of $11,000,000 improperly included in the $48,000,000 be deducted (*post*, p. 165), the annual return assured by the preferential provided by the contract would be 17.1%.

Recapture at cost plus 15 per cent.

Contract #3 contained one other very material provision that was not in Contract #1 or #2. It was inserted pursuant to the requirements of the Rapid Transit Act as amended in 1909 and 1912. This is the provision for recapture by the City of New York of any and all of the lines constructed under Contract #3. This is in effect a continuing option by which the City of New York may at any time after ten (10) years from the beginning of operation pay off the Interborough's charge upon earnings for its advances for construction and equipment. If such payment be made at the end of ten (10) years the Interborough would receive 115% of its outlays. If made after ten (10) years such percentage will be diminished 1/39th thereof for each year that thereafter elapses (due to its having received an annual instalment of 1%): so that at the expiration of forty-nine years nothing whatever would have to be paid (Art. LXXVIII).

Upon the exercise of such option the contract would be terminated as to the line or lines so recaptured.

Provisions to recapture are also contained in the elevated railroad certificates for additional tracks and extensions; which are a part of the same transaction as contract #3. Such provisions differ somewhat in their terms. They will be hereinafter discussed.

Mention is here made of these provisions because of their very direct bearing on the value of the Interborough investment, the 10 year period having elapsed.

The net result of the new arrangement.

Neither contract No. 1 or No. 2 contained any provision obligating the Interborough Company to operate additions or extensions to the lines included in such contracts (R. 186; *supra*, p. 17). *This is what the City obtained by contract No. 3.*

For a long time the Interborough wanted no new lines constructed. It was satisfied to profit by increasing congestion, discomfort and public inconvenience. It was not perturbed by legislation of 1906 authorizing municipal operation as well as construction, for this implied a new system which the City's debt limit then rendered unlikely. But in 1909 the State Constitution was amended to enlarge the debt limit by exempting self-sustaining bonds (Art. VIII, Sec. 10), and the Rapid Transit Act was amended by provisions for recapture and division of earnings of lines constructed wholly or partly by private capital (Laws 1909, Ch. 498).

Competitors appeared, among them, Hudson & Manhattan Railway Company, owning and operating tunnels under the Hudson River between New York and points in New Jersey which submitted a proposal for new subways (R. 189). The attitude of the Interborough changed, but

not its cupidity. It submitted a competing offer (R. 216, 221). Notwithstanding its terms were such as to preclude acceptance, the Interborough attempted to arouse public sentiment in its favor by hiring space in the daily press, using it in a way calculated to impel the people to bring pressure on public officials to act favorably toward the Interborough (see the advertisement in the *World* for April 22, 1909, R. 217).

Ultimately it was the competition of Brooklyn Rapid Transit Company that resulted in the Interborough's offer of February 27, 1912, and contract No. 3 (R. 576, 577). It agreed to operate the additions and extensions it had delayed six years. It preserved intact the earnings of the old lines, fattened by public inconvenience to the record figure of $6,335,000 at June 30, 1911. It secured the right to straighten and shorten its line in the event of recapture by the City. It procured free trackage rights over the City's new lines for operation of Manhattan Elevated trains.

For the moneys it advanced it obtained a prior charge on revenues for repayment in annual instalments and interest, on terms that assured it a net profit of $113,353,846; *while its bondholders from whom it obtained the moneys advanced have direct protection in the contract in case of Interborough's default* (Contract No. 3, Art. LXXXIX, "1"). And if any further profits ever arise from operation, after payment of the City's 8.76% the Interborough will retain for itself at least fifty per cent (Art. L).

The City obtained an agreement for the extensions and additions it had sought for seven years, and wholly subordinated the possibility of any return upon its outlays.

Construction and beginning of operation of new lines.

Following the execution and delivery of the contracts and elevated railroad certificates construction of the new lines was carried forward. The method of doing this is prescribed in Article IX of Contract #3, which provides that contracts for construction shall be made at public letting by the City. Provision of equipment was an obligation of the Interborough Company.

Contract #3 provided that the lease of the "Railroad and Equipment" (new lines, Definitions, 10, 15) should begin January 1, 1917.

> "The plaintiff delayed the provision of equipment that it was obligated to provide under Contract #3, for approximately three years; such delay was deliberate and intentional and intended to postpone the time when, pursuant to the provisions of said contract, operations under such lease should begin and pooling of the revenues should take place; and by reason of which postponement the plaintiff, Interborough Rapid Transit Company was enabled to retain for itself all of such revenues.
>
> Under the provisions of said Contract #3, the lease was to begin on January 1, 1917. At that time, Interborough Rapid Transit Company, the plaintiff herein, had scarcely begun the provision of material parts of its equipment. *The conduits connecting the power house at 59th Street & 12th Avenue with Lexington Avenue at 57th Street & Lexington Avenue, were laid in the late winter of 1918, under conditions of weather and ice at greatly increased cost.* Much of the work done in laying such conduits was the cutting away of the solid ice overlaying the surface of the streets, as the result of intermittent snow, sleet and rainstorms, which were frozen solid.

> Interborough Rapid Transit Company, plaintiff herein, not having furnished such equipment so that the operations under such lease could begin on January 1, 1917, it was necessary to postpone the effective date thereof, which was done pursuant to action of the Board of Estimate and Apportionment taken August 2, 1918, by which the said lease became effective on January 1, 1919, and its expiration was extended to December 31, 1967" (Answer and counterclaim of the defendant City of New York, R. 744-745, 750).

In the Interborough's reply to such counterclaim, it denies that it delayed the provision of equipment for the purpose alleged, and that it had "scarcely begun" the provision thereof on January 1, 1917. It does not deny that the conduits above mentioned were laid as alleged in the City's answer and counterclaim, but asserts that it was "in no way responsible", and that "the same was fully completed prior to the commencement of operation under contract number 3" (R. 759).

This latter assertion is somewhat *maladroit*, for it is manifest that the duct lines had to be "completed prior to the commencement of operation under contract number 3", because such operation could not be had until the power supplied by such duct lines was rendered available thereby.

Operations under the lease therefor began January 1, 1919.

Had the construction and equipment on the new lines gone forward without undue delay to completion on January 1, 1917, the increased costs of labor and material resulting from the World War would have been avoided, and the vast addition to the cost of construction and equipment caused thereby would not have occurred.

City's investment exceeds $200,000,000.

In the newer rapid transit lines, constructed under contract #3, the City of New York expended $139,377,007.33 prior to the commencement of this action (R. 741).

The total amount invested by the City of New York in the rapid transit lines constructed under contracts numbers 1, 2 and 3, prior to the commencement of this action was $200,579,084.36 (R. 740-741). This sum does not include certain real property, rights in, along and under the City's streets, parks and waterfronts, nor large expenditures for overhead, salaries, interest and other outlays provided in the annual tax budget (R. 1172). All this has been in reliance upon the contract obligations of Interborough Rapid Transit Company for the operation of such lines, and which, by the order appealed from, have been annulled.

Interborough's investment.

In pursuance of its obligations under contract #3 the Interborough Company contributed to the cost of construction $57,857,761.96; and for the cost of additions to construction $139,138.39 (R. 741).

It provided equipment for "initial operation" costing $22,000,000; and it provided equipment for "initial operation" which cost in excess of said $22,000,000, to the extent of $27,953,166.62 (R. 741).*

It provided for additions for equipment after the commencement of initial operation costing $12,937,806.32 (R. 741). These sums constitute the "investment" of the Interborough as defined in the Rapid Transit Act (quoted *supra*, p. 36).

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* See definitions in Contract No. 3 for meaning of these terms (Art. II, 15, 16).

Heavy burdens imposed on revenues by Interborough's conduct.

The great increase in expenditures for equipment by the Interborough amounting to $27,953,166.62, *supra*, and the wholly unnecessary enlargement of outlays for construction imposed by it upon the City of New York, not only threw a much heavier burden on revenues than was contemplated when the contracts were made and good faith in performance by the Interborough assumed, but a reckless and improvident policy of the Interborough in the payment of dividends (15 per cent in 1914, 20 per cent in each of the years 1915, 1916 and 1917, 17½ per cent in 1918 and 5 per cent before suspension in 1919) (R. 1066) depleted its cash resources, impaired its credit and compelled it to arrange additional financing at high rates of interest and heavy discounts (R. 1088) which further increased the burden on revenues to pay high interest and repay principal.

Improvident financing leads to request by Interborough for City's consent to increase fare.

With the speculative and improvident Manhattan Elevated guarantee of 7 per cent, the Interborough was impelled to throw itself upon the charity of the city, as soon as operations of the new lines began. We quote its own declarations (referring to the Board of Estimate and Apportionment and Transit Commission):

> "These two public bodies have the legal power by concurrent action to amend the contracts between the city and the company in such manner as to permit it to procure the funds with which to carry out their proposals, but all efforts in that direction have failed to accomplish any such result. They have both publicly declared their opposition to any change in the rate of fare prescribed in the contracts of 1913. In 1918, 1919 and 1920 this company, without suc-

cess, urged the city administration to consent to a change in the rate of fare" (R. 1200).

Interborough's deductions from revenues.

From January 1, 1919 (when the lease began) to January 31, 1928, Interborough Company received operating revenues under contract #3 amounting to $343,036,399.50. From the foregoing it deducted for rentals, taxes operating expenses (exclusive of maintenance), maintenance, and depreciation (being the matter specified in subdivisions 1-a(), (b), 2, 3, 4 and 5 of Article XLIX of contract #3), $223,386,817.70. It has also deducted from the foregoing revenues for its preferential of $6,335,000 per year (subdv. 6 of Article XLIX) $57,542,916.67; for six per cent. per annum on its contribution to cost of construction of railroad, $30,465,732.22; for six per cent. per annum on its cost of equipment of railroad (subdv. 7 of Article XLIX) $11,990,000; for its interest on cost of additional equipment, $15,872,405.32; for one per cent. per annum on its cost of additional equipment to provide for sinking fund (subdv. 8 of Article XLIX), $2,382,526.57; for its interest on cost of additions to construction $37,874.21; for one per cent. per annum on its cost of additions to construction to private sinking fund $7,574.81 (R. 741-742).

Interborough paid in full.

These various sums discharge in full all claims of Interborough Company under the contracts arising to January 31, 1928, two weeks before the commencement of this action.

It has unjustly deducted from the revenues for its own purposes, the sum of at least $3,682,980.12, more than it is entitled to claim or receive under the terms of such contract #3 (R. 742).

It has paid nothing to the City of New York on account of 8.76 per cent of its cost of construction.

Applications to Transit Commission.

On May 28, 1920, the Interborough Company made an application to the Transit Commission for an increased fare under contracts Nos. 1, 2 and 3, which on the same day was denied for lack of jurisdiction (R. 1024). It sued out a writ of certiorari to review such action (R. 1071), printed a brief of 101 pages (R. 1073-1074), procured a preference for its argument in the Appellate Division (R. 1071); *but after the Court of Appeals rendered its decision on October 22, 1920, on the application for reargument of the Garrison cases* (*post*, pp. 149-151), *the Interborough abandoned its certiorari proceeding without argument* (R. 1071).

On March 22, 1922, the Interborough made a second application to the Transit Commission, which covered the elevated railroads as well as the City owned subways, which was denied "for lack of jurisdiction" on March 28, 1922 (R. 1024-1025). No atempt was made to review this denial.

Both of such applications were made under Sec. 49 of the Public Service Commissions Law (R. 1024).

Petition to Legislature.

On March 3, 1925, the Interborough petitioned the Governor and the Legislature of the State of New York, alleging that "the police power of the State is paramount. Its exercise, *with the consent of this Company*, establishing a just and reasonable rate of fare, is binding upon the City administration * * *" (R. 1200).

The Interborugh's request that the Legislature relieve it from the obligation of its contracts was not granted.

Filing of bill herein.

On February 1, 1928, the Interborough, assuming to exercise its asserted power to abrogate the contract rates of fare, filed with the Transit Commission schedules or rate sheets, purporting to change the "rate of fare from five (5) cents to seven (7) cents", effective March 3, 1928. (*Complaint* XXXIV, *R.* 40, 41; *R.* 128.)

On February 14, 1928, about two hours before the Transit Commission rejected such schedules as unlawful and dismissed the Interborough's application (R. 884) it filed its bill of complaint herein claiming confiscation on the theory that from the time Contract No. 3 was made on March 19, 1913, the rates of fare agreed upon therein and previously in contracts Nos. 1 and 2, as well as the elevated railroad certificates were and *for fifteen years preceding the filing of the bill* had been subject to regulation by the Transit Commission and its predecessors, without the consent of the city, because the contracts were executed in 1913 "in the presence of the Public Service Commissions law" (R. 1979) and the Interborough Company "*by implication • • • was empowered to abrogate the same as to the rates stipulated therein*" and in the Elevated Railroad certificate (R. 53, 38).

IV.

Specifications of Error.

1. The Court erred in taking jurisdiction of this case.

4. The Court erred in holding that the plaintiff was not bound by the provisions of Contracts #1, #2 and #3, and each of them, that during the term of such contracts

and each of them, the plaintiff be entitled to charge for a single fare upon the Rapid Transit Railroad, constituting what is called the plaintiff's Subway Division, the sum of five (5) cents, but not more.

5. The Court erred in holding that the plaintiff was not bound by the provisions of the Elevated Railroad Certificates, and each of them, dated March 19, 1913, that it should be entitled to charge for a single fare the sum of five (5) cents, but not more, over the railroads mentioned, referred to or described therein, including parts of the municipal railroad over which the plaintiff was provided with trackage rights, and additional tracks, and the Manhattan Railroad.

6. The Court erred in not holding that Contract #3, the Elevated Railroad Certificates, and other agreements and instruments, authorized, executed and delivered on, or pursuant to action taken on March 19, 1913, or thereabouts, were not parts of a single transaction whereby the plaintiff was obligated to receive and charge a fare of five (5) cents, but not more, on all of the several lines constituting what the plaintiff denominates as its Subway Division, and Manhattan Division.

7. The Court erred in holding the Contract #3 in its terms superseded the provisions of Contracts #1 and #2 as to the rate of fare.

8. The Court erred in holding that the Elevated Extension Certificate was not granted under authority of the Rapid Transit Act, as amended in 1912.

9. The Court erred in holding that the five (5) cent fare limitation was established by Chapter 743 of the Laws of 1894, unless the Extension Certificate of March 19, 1913,

or Resolution of the Board of Estimate and Apportionment formally approving the proposed Certificate and consenting to the construction and operation of the extensions, in accordance therewith, were a constitutional consent to a different fare.

10. The Court erred in holding that the five (5) cent fare limitation as to the Elevated Railway Company is statutory under Chapter 743 of the Laws of 1894 and that the action of the Board of Estimate and Apportionment in relation to the Elevated Railroad Certificates was ineffective to create any contractual fare limitation.

12. The Court erred in holding that Contract #3 was a waiver of the fare provisions in Contract #1 and #2.

13. The Court erred in holding that when Contract #3 was made the fare provisions thereof were subject to regulatory revision in the manner prescribed by the Public Service Commission Law.

14. The Court erred in holding that Contract # 3 must be regarded as qualified by the restrictions of the Public Service Commissions Law.

15. The Court erred in holding that the Contract #1, #2, and #3 furnish, and neither of them furnishes, no obstacle to the exercise of jurisdiction by the Public Service Commission to regulate the rates of fare therein provided.

16. The Court erred in holding that there was nothing in the amendment of the Rapid Transit Act in 1912 which excludes the plaintiff from the application of the regulatory plan, and that that Act contains no clear and unmistakable evidence of effect to delegate to the City authority to

establish by contract in 1913 unchangeable rates to be charged by the plaintiff.

18. The Court erred in holding that the State courts have announced that there must be read into the contracts made after 1907 the authoritative regulation provided for by the Public Service Commissions Law.

20. The Court erred in holding that the Rapid Transit Act as amended in 1912 did not grant unqualified authority to contract for a fixed rate of fare for the entire life of the contract, and that the contractual authority was confined by the Public Service Commissions Law to the establishment of temporary rates, not foreclosing either party against change.

21. The Court erred in holding that the provision of the lease in Contract #3, "the lessee shall during the term of the contract be entitled to charge for a single fare upon the Railroads and Existing Railroads the sum of five (5) cents but not more" was subject to the regulatory law and power of the Public Service Commission.

22. The Court erred in holding the total value of the property used in the system operated by the plaintiff to be $898,793,648.

23. The Court erred in holding that the operation by the plaintiff shows an actual earned return of only 2.65% in 1926 and 2.52% in 1927.

24. The Court erred in holding that the plaintiff was entitled to a return upon a valuation of $898,793,648.

25. The Court erred in holding that the plaintiff was entitled to a return of 8% upon the foregoing valuation, or any other valuation.

26. The Court erred in holding that the plaintiff was entitled to any return upon the subways owned by the City of New York and denominated by the plaintiff as its Subway Division, on any other basis than that provided in Contracts #1, #2 and #3, and each of them.

27. The Court erred in holding that the plaintiff was entitled to any greater return upon the lines embraced in what it denominates as its Manhattan Division, than is provided in the Elevated Railroad Certificates.

28. The Court erred in holding that the value of property owned by the City of New York could be taken as a basis of a return on operations by the plaintiff.

29. The Court erred in holding that the present value of property provided by the plaintiff, exclusive of City property, shows a return of 3.61% actually earned in 1927.

30. The Court erred in holding that the present value of the Company owned and Company provided property, amounts to $554,413,648.

31. The Court erred in holding that the return guaranteed by the Constitution is upon all of the property devoted to the public use, including that of the City of New York.

32. The Court erred in holding that the return to which the plaintiff is entitled depends upon the present value of the property used.

33. The Court erred in holding that the denial by the Transit Commission of a change of rate of fare was a denial of due process of law.

34. The Court erred in holding that under the present rate of fare there would be a continuous confiscation amounting to taking property without due process of law.

35. The Court erred in holding that the plaintiff had established its claim of confiscation of its property and that it was entitled to the injunctive relief it seeks.

36. The Court erred in permitting the plaintiff to charge a seven (7) cent fare on the Rapid Transit Railroads operated by it, or any of them.

38. The Court erred in appointing a Special Master to take testimony and evidence upon the issues herein.

40. The Court erred in holding that there was a federal question in this case.

V.

Argument.

Summary of Argument.

This appellant, therefore urges the reversal of the order in the following points:

Point I. The contracts between the City of New York and the Interborough Rapid Transit Company are not the subject of regulation. The City of New York does not require a railroad corporation for the operation of its rapid transit railroads.

Point II. The power of regulation is never exercised except in the public interest.

It is not in the public interest to frustrate the City's plan and policy of distribution of population.

The powers and duties of the Municipal Government cannot be transferred to or vested in or subordinated to the Transit Commission, a body of State officers, in disregard of the local self-government provisions in the State Constitution.

Point III. If it be assumed that it is a public service corporation as distinguished from a private corporation

rendering a service for the City of New York, valid contracts existing between the City of New York and Interborough Rapid Transit Company fix the rate of fare at five (5) cents during the term thereof. Such contracts were made under full and express legislative authority. The validity thereof, and the constitutionality of such legislation, have been adjudicated and sustained by the Court of Appeals of the State of New York. Where there is a contract, there is no confiscation.

POINT IV. The Rapid Transit Act, pursuant to which such contracts and Elevated Railroad Certificates were made, is a comprehensive special statute excluding any possible subordination to the Public Service Commissions Law.

POINT V. The Legislature has not at any time empowered the Public Service Commission to regulate the rates of fare agreed upon in contracts made by the City of New York pursuant to the Rapid Transit Act.

POINT VI. The decisions of the State Courts in gas and street surface railway cases cited in the opinion, do not sustain the conclusions of the Court below but are contrary thereto. In particular, the decisions in the *Garrison* cases on reargument are fatal to the claims of the Interborough Company based on the *Nixon* case.

POINT VII. There is no confiscation of public property. On the undisputable facts as to the property of the plaintiff involved herein, there is not even a plausible claim of confiscation of private property.

POINT VIII. The Elevated Railroad Certificates for additional tracks and extensions are affected by like statutory authority and contract obligations.

POINT IX. The Court below was imposed upon. There is no federal question in the case.

POINT I.

The contracts between the City of New York and the Interborough Rapid Transit Company are not the subject of regulation. The City of New York does not require a railroad corporation for the operation of its rapid transit railroads.

> "The right and franchise to operate its railroad under contracts under the *special statute*, vested in the City as a municipal corporation, not as a railroad corporation or private common carrier. (*Sun Printing & Publishing Assn.* v. *Mayor, etc. of N. Y.*, 152 N. Y. 257, 267) * * *."
>
> "* * * The Public Service Commission may not veto a statute. It is only a legislative creature."
>
> *City of New York* v. *Brooklyn City R. R. Company*, 232 N. Y. 463, 470.

The railroad referred to in the quotation is one owned by the City of New York on the Williamsburgh Bridge, over the East River, power to operate which "was granted by the Legislature in 1896 without qualification or restriction."

The authority relied upon for such declaration of principle by the Court of Appeals was it own decision upholding the constitutionality of the Rapid Transit Act as authorizing a great city purpose; and is of course applicable to its rapid transit railways.

The Rapid Transit Act does not require that the contractor whom the City employs for the operation of its rapid transit properties, be a railroad corporation.

At the very outset, and irrespective of any implications of the Public Service Commissions Law or from the alleged analogy of decisions in street surface railway cases, is the question whether the contracts between the City of New York and Interborough Rapid Transit Company are of a character that permit of regulation.

While these contracts contain what is called a "lease", they are, in effect, contracts of employment, or for personal service, by which the Interborough Company operates for the City of New York the subway system, constructed at public expense, to effectuate a great City purpose.

Interborough in shoes of McDonald and Rapid Transit Subway Construction Company.

The Interborough Company is alleged to be a railroad corporation, *but it is not at all necessary that it should be so; nor does such circumstance change the character of its relations with the City.* The Interborough Company is the assignee under contract No. 1 of *an individual*, John B. McDonald. Under contract No. 2 it is the assignee of a *business corporation*, the Rapid Transit Subway Construction Company. Under contract No. 3, made by virtue of being such assignee, it operates *additions and extensions to lines constructed under contracts Nos. 1 and 2.* (So alleged in Complaint XLIII; R. 51.)

When it was found impossible to procure new rapid transit facilities by private capital, the amendment made to the Rapid Transit Act in 1894, authorizing, subject to the referendum, later approved, their construction at public expense, it provided that the Rapid Transit Board

> "for and in behalf of said City shall enter into a contract with *any person, firm or corporation* which in the opinion of said board shall be best qualified to fulfill and carry out said contract."

That provision has never been changed; having been continued through all amendments and revisions down to the present time. (*Section 27, subd. 1, of Rapid Transit Act as amended by Laws of 1912, Ch. 226, R. 1033.*)

The case may be considered, therefore, as though no assignment had ever been made to the Interborough Company, and regardless of the fact that it was organized under the Railroad Law. *There is nothing in the Rapid Transit Act that requires the contractor to be a railroad corporation.*

In *People ex rel. Interborough Rapid Transit Company* v. *Tax Commissioners,* 126 App. Div. 610 (aff'd 195 N. Y., 618) at p. 611, the Court says:

> "By the Rapid Transit Law and the acts amendatory and supplemental thereto, the special franchise as well as the road itself is the property of the city, and is merged in and became a part of the public highway for the public use.
>
> Had this underground highway been constructed for the use of automobiles, or a particular class of vehicles owned by individuals, it would not be considered that the operator of such vehicles thereon was exercising a public franchise in the highway, although he paid a toll each time he used it; and if a vehicle of the class intended charged a fare to those riding therein, the situation would not be changed.
>
> The city itself was not given the power of a railroad corporation, and was, therefore, incapable, except through the contract which the statute authorized, of making this public work available for public use. For the purposes of this case it is unnecessary to determine whether the relator is technically a lessee, an operator or a separate contractor who performs a public service which the city could perform only through the agency of another, and the performance of which it was its duty to provide. How-

> ever the matter is viewed, we find a public highway, operated in a manner required by the statute and the commission in charge of it, the operator paying a fixed sum to the city for the use of the property and the balance of the fares are held by it for performing the public service. The statute defines the relator as an 'operator', or a 'lessee', speaks of the 'rental for the use of said road' and provides that the contract may permit 'a renewal or renewals of the lease of said road'."

In *Interborough Rapid Transit Company* v. *Sohmer*, 237 U. S. 276, at p. 284, the Court said:

> "However probable and expected it may have been that a corporation would run the road, it was left possible for a natural person to do it, as in fact an individual took and held the first contract for two years."

Fare or tolls a specification in contract advertised at public letting.

Section 36 of the Rapid Transit Act, as added by L. 1894, ch. 752, §9, provided:

> "The said board of rapid transit railroad commissions before awarding any contract or contracts shall advertise for proposals for such contracts * * *"

The City specified the character of service and the rates of fare in the form of contract which accompanied the invitation to bidders (Contract No. 1, p. 127; Contract No. 2, p. 112) and formed the basis of proposals (Contract No. 1, p. 135; Contract No. 2, p. 119) for construction and operation.

Those who bid on the contracts accepted the fare specification, as they did the location and character of construction of the road and the period of operation; all of which were determined as a matter of policy before advertising for proposals and specified as terms and conditions. (*Rapid*

Transit Act, Section 36, added by L. 1894, Ch. 752 §9, and amended by L. 1895, Ch. 519 §11; L. 1909, Ch. 498 §16.)

In other words, while the rate of fare was one of the terms and conditions of the contract resulting from the acceptance of a proposal submitted in response to an advertised letting, it was not a matter that the City or the Board ever discussed with the contractor or in which he had any voice any more than in the location of the road.

Chapter 226 of the Laws of 1912, which authorized contract No. 3 to be made, reenacted the requirement that the contract contain the

> "terms and conditions as to the rates of fare to be charged."

Amendments of 1909 and 1912 provided for readjustment of operator's compensation, but not by a change of fare.

In 1909, further amendment was made that in the case of operation by contract, the "person, firm or corporation" having such contract might pay as rental "either a specified sum of money or a specified proportion of income, earnings or profits of such road, or both."

This amendment further provided that the contract in such a case "*may* further provide" that the rental "may be readjusted at the expiration of a prescribed period which shall not be more than twenty years". (*Laws 1909, Ch. 498, Sec. 10, amending Sec. 34-a, now renumbered as Section 27, subdiv. 4*).

Such a readjustment of the rental necessarily involved a readjustment of the compensation of the contractor, which was a "specified sum" or "specified proportion" of earnings, income or profits. *It involved no change in the rate of fare established to effectuate the City's policy.*

The Wagner bill, prepared especially for the proposed Contract No. 3 with the Interborough, carried a further amendment at the end of the same subdivision of Sec. 27,

authorizing a provision for readjustment "at specified intervals" not prescribed.

The provision as amended by the Wagner bill appears in the footnote.*

While Sec. 27, subd. 4 provided that the contract contain a provision for readjustment of rental (or compensation), *it contained no such provision for a change in fares.*

Moreover the statute provided that any readjustment of compensation was not by regulatory authority under the Public Service Commissions Law, but by agreement, arbitration or the Court.

Interborough conclusively elected no readjustment of compensation.

But while the Interborough could have had a provision in the contract for a readjustment from time to time of its compensation, by changing the division of income, earnings or profits, so satisfied was it to go forty-nine years with no change that it *conclusively elected to omit such a provision.*

The contractor could have no interest in the rate of fare, except as it might affect his or its compensation.

At the present time, the only thing in which the Interborough Company is interested is *more compensation.*

In case of municipal operation, changes in the rate of fare were to be made by readjustment from time to time by the Board of Rapid Transit Railroad Commissioners, but always with the public interest in mind, of furnishing service at cost (*ib., §34-d, now Rapid Transit Act, §30*).

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* "*The contract may provide for a readjustment at specified intervals of the part or proportion of the said income, earnings or profits of the railroads, which the city shall receive, or of the portion of the amount received by the city which shall be deemed to be the rental of each such road owned by the city, and may prescribe a method of determining by arbitration or by the court the amount which the city shall receive as its part or proportion of such income, earnings or profits or as such rental upon any such readjustment thereof*" (Rapid Transit Act, Sec. 27, sub. 4 as amended by Laws 1912, ch. 226).

"It is authorized to lease its railroad, either for a 'specified sum of money or a specified proportion of income, earnings or profits'; or it may operate the road itself and charge such rates of fare for the transportation of persons and property as may be fixed by its own boards and officers" (*L. 1909*, ch. 498, §§27, 30).

Matter of Rapid Transit R. R. Commissioners, 197 N. Y. 81, 96.

That case was decided two and one-half years after the enactment of the Public Service Commissions Law.

It is clear, therefore, that the rates of fare, and whether compensatory or not, were no concern of the regulatory authority created by the Public Service Commissions Law.

Surely, the circumstance that the City employed a contractor to operate, instead of doing so itself, could make no difference.

The Public Service Commissions Law does not purport to regulate the compensation of individuals who might constitute any "person" or "firm" performing the service of operation for the City of New York in carrying into effect the City purpose of providing rapid transit facilities for its inhabitants; or of any Corporation doing so.

The Interborough Company, as assignee of any such individual, firm or business corporation, stands in no different position.

This but serves to emphasize that whatever action is to be taken in regard to rates of fare on rapid transit lines of the City of New York, is to be done by action of the City itself, and not by any "person, firm or corporation" whom it has employed to perform part of its service for it.

Neither the Legislature nor the courts of New York have ever recognized any authority to fix or change the

rates on the rapid transit lines owned by the City of New York, other than that exercised by the City of New York through its own Boards.

Matter of Rapid Transit Railroad Commissioners, 197 N. Y. 81;
Sun Printing and Publishing Assn. v. *Mayor, etc.*, 8 App. Div. 230; 152 N. Y. 257;
Rapid Transit Act, Secs. 27, 30, 58;
Board of Transportation Act (Laws 1924, Ch. 573, Sec. 135).

In *Arkansas Natural Gas Company* v. *Arkansas Railroad Commission*, 261 U. S. 379, this Court held that a gas producing company delivering gas as an independent contractor to a gas distributing company for a percentage of the collections for the gas which the latter sold to customers, was not subject to regulation by a public utility commission, so that the prices at which it sold gas under contract to the distributing corporation could be changed by such regulation.

> "There is no claim that rates to consumers were affected by these contracts; nor does it appear that the public interest is involved in the action which the commission was asked to take" (p. 381).

The present case is much stronger.

The Interborough Company as assignee of McDonald, Rapid Transit Subway Construction Company, and, as a "corporation" in the same category as such a "person, firm or corporation", is delivering the service bought and paid for by the City of New York to the inhabitants of the City, for whom rapid transit facilities providing such ser-

vice have been provided in effectuating a great City purpose.

It cannot be truly or accurately said that the inhabitants of the City are the "customers" or "consumers" of the Interborough Company. If they are to be denominated "consumers" or "customers", they are such of the City of New York.

In the case of the distribution of gas, the full purchase price was paid by each particular customer for the quantity consumed by him.

In the case of the City of New York, each inhabitant who travels on the subways pays "such fares and tolls * * * as may be imposed and provided for by the Board of Rapid Transit Railroad Commissioners in said City" (*Laws 1894*, ch. 152, §63; now *Rapid Transit Act*, §58, *Laws 1915*, ch. 604).

In a given case such fare or toll may or may not be the full purchase price; for the City of New York, in effectuating its great City purpose, has recourse to taxation to provide such part of the price to the consumers as its proper officers, in the exercise of their discretion, deem proper in carrying into effect the City's policy. No part of any such taxes is collected by or paid over to the Interborough Rapid Transit Company or "any person, firm or corporation" rendering a service for the City of New York upon a basis of agreed compensation.

Under its contracts with the City of New York the Interborough is merely John B. McDonald, the individual, performing the services undertaken by him in one case, and Rapid Transit Subway Cónstruction Company, a business corporation, in the other, and under contract number 3 it is a mere "corporation" operating extensions of lines con-

structed under contracts Nos. 1 and 2, and having and exercising no different attributes than a "person" or a "firm" employed by the City of New York.

We repeat, therefore, that the contracts between the City of New York and John B. McDonald, a "person", Rapid Transit Subway Construction Company, a (business) "corporation", and Interborough Rapid Transit Company, a "corporation" providing for the furnishing to the inhabitants of the City of the service provided at public expense, the physical features of which are performed under such contracts, or employments, are not the subject of regulation under the Public Service Commissions Law.

POINT II.

The power of regulation is never exercised except in the public interest.

It is not in the public interest to frustrate the City's plan and policy of distribution of population.

The powers and duties of the Municipal Government cannot be transferred to or vested in or subordinated to the Transit Commission, a body of State officers, in disregard of the local self-government provisions in the State Constitution.

The power to regulate rates, in contravention of contract stipulations, must be exercised solely for the public welfare.

Arkansas Natural Gas Company v. *Arkansas Railroad Commission*, 261 U. S., 379.

By the order appealed from, the Statutory Court has vested the Transit Commission with power to nullify and frustrate the great City purpose of distribution of population accomplished through the Rapid Transit Act, and the contracts made thereunder.

Such a construction of the statutes is clearly in violation of the local self-government provision of the State Constitution and completely destructive of all municipal authority and discretion in the use of vast sums of public money, the approval of routes for the construction of rapid transit lines by the local authorities, and the authorization of contracts therefor.

The distribution of population.

A fundamental purpose has been the distribution of population from densely congested, to more open and less

occupied sections; to be accomplished by the projection of new lines into such territory in the various boroughs simultaneously; providing equal opportunity for development, so that a choice of habitation would not be affected by lack of proper transit facilities; and property owners and taxpayers in any borough would be subject to no burdensome discrimination whereby delay in the provision of rapid transit facilities would work to the detriment of one and to the advantage of other localities favored with earlier provision.

This policy, involving the responsibility and discretion of the municipal officers having power to make appropriations for public improvements, raise money by tax, and pledge the credit of the City, necessarily required that the final decision as to the location of, expenditure for, and contracts controlling rapid transit facilities, should be in such officers; and accordingly, since 1905, all of such responsibility and authority has been vested in the Board of Estimate and Apportionment of the City of New York. Under Article X, Section 2, of the Constitution of the State of New York, providing so, it could not be otherwise.

Where Transit Commission has power of regulation it may prescribe zoned fares.

If the Transit Commission under the Public Service Commissions Law has power to fix rates of fare on the rapid transit lines involved herein, *it may prescribe a system of zoned fares.* There is no prohibition against this in the statute, and the Court is powerless to limit the authority of the Transit Commission, if it exist. If possessed of such power, the Commission could fix a five (5) cent fare for a short haul and higher fares for longer hauls.

The Interborough asserts the right to put in its own schedule of rates (R. 53), which may zone fares.

Matter of Village of Mamaroneck v. *Public Service Com.*, 208 App. Div. 330, 331.

Fares by zones prevent distribution of population.

A vital and controlling element in any plan for the distribution of population was that all parts of the Greater City be made accessible at the same rate of fare. If fares were fixed by zones, involving a higher fare for more remote zones, the inevitable result would be congestion of population in the cheaper through the disinclination of people to impose upon themselves the burden of a higher fare, where a lower fare could be had from a locality nearer to their place of work or business.

In the State courts, in construing the Rapid Transit Act, it is the rule to take judicial notice of local conditions in New York City.

Admiral Realty Company v. *City of New York*, 206 N. Y. 110, 127;

Sun Publishing Assn. v. *Mayor, etc.*, 8 App. Div. 230, 238.

The population of more than one million in the Borough of the Bronx is located at least twice, and much of it, five times the distance from the business, shopping and theatrical districts of Manhattan, as corresponding populations in the Boroughs of Brooklyn and Queens. Similarly, still greater populations in Brooklyn and Queens and Upper Manhattan, are even more remote than the population in the nearby zones.

A zoned fare would depopulate these remote but much more desirable sections for home development and move the population into the congested area of the lowest fare.

It would at the same time be destructive of property values in the sections affected by the higher fares.

The taxable values created by provision of Rapid Transit facilities at public expense would be depreciated or destroyed, and the City deprived of revenues upon which it relies to carry out its purposes.

It was to avoid such conditions and bring about a proper distribution of population and an even opportunity for development of property in all boroughs, that the great City purpose underlying the Rapid Transit Act, fortified with huge public appropriations, was undertaken.

Control of City's streets.

Among the important powers and duties of the Board of Estimate and Apportionment, the governing body of the City of New York, are those relating to streets. It is vested with power to acquire, open, close, widen, alter, regulate, grade and pave streets and to zone the property abutting thereon for residence, business, manufacturing and other purposes (*Greater New York Charter*, Sections 242, 242A, 242B, 442).

Under the Constitution and the Rapid Transit Act, its consent and approval is required for the location of all rapid transit railroads, and no appropriation for the construction or operation thereof can be made by any other board or body.

In *Sun Printing & Publishing Assn.* v. *Mayor, etc., of New York*, 152 N. Y. 257, at p. 265, the Court says:

> "Common highways have always been regarded as under the special care, supervision and control of municipal governments, upon which devolves the duty of keeping them in suitable repair as well as the duty of providing sufficient ways to satisfy the re-

quirements and answer the convenience of the public."

At page 267:

"Common highways are clearly within the provisions of the Constitution for a 'city purpose'."

At page 268:

"As we have seen, the statute provides that, if the road shall be constructed at the city's expense, the road or roads shall 'be deemed to be a part of the public streets and highways of said city.' • • • Here we have an express provision in aid of the authorities making the proposed road a part of the public streets and highways of the city, placing it upon the same footing, entitling it to the same consideration, and designing it for a 'city purpose', with the same force and effect as if it was an ordinary public street."

At pages 269-270:

"It is provided that in case the road shall be constructed by and at the city's expense, then and in that event the road so constructed shall be and remain the absolute property of the city, so that whatever the municipality expends in the construction of the road is for the creation of its own property • • •."

In *City of New York* v. *Brooklyn City R. R. Co.*, 232 N. Y. 463, at page 471, the Court says:

"Common highways have always been regarded as under the special care, supervision and control of municipal governments, and their construction and management are clearly within the provision of the

> Constitution a city purpose. It follows that railroads and bridges which serve the same purposes as common highways may, under legislative authority, be constructed and operated by a city."

The Transit Commissioners acting under the Public Service Commissions Law are State officers (*Public Service Commissions Law, Sec. 4-a, as amended by L. 1928, Ch. 732, §7*). They have no power to exercise any such authority over the City's officers, streets and property, for the reason that the Legislature has conferred no such power, and is incapable of doing so.

In disregard of the State Constitution, the order appealed from requires state officers to exercise dominion and control over the streets and property of the City of New York, which can only be validly exercised by local elective officers in the manner prescribed in the State Constitution.

In *Louisiana Public Service Commission* v. *Morgan's Louisiana & Texas Railroad & Steamship Company*, 264 U. S. 393, after quoting from the local self-government provision in the Louisiana Constitution, for the City of New Orleans, the Court said (p. 399):

> "Unless and until otherwise advised by the supreme court of Louisiana, we must conclude that the general control of its own streets is an ordinary governmental function of the city of New Orleans.
>
> It would require more definite language than we find in the Constitution of 1921, or in Gulf, C. & S. F. R. Co. v. Louisiana Pub. Serv. Commission, to convince us that the commission has power to assume control over all those streets within New Orleans which approach or cross railroad tracks, and to disregard the solemn contracts of the municipality with respect thereto. That the liability which the commission has undertaken to impose upon appellee conflicts with the contract under which the latter granted permission to construct the viaduct over its prop-

erty, is not denied. Only very clear and definite words would suffice to show that the state had undertaken to authorize a thing so manifestly unjust and oppressive."

The order makes the Transit Commission, a State body, the policy determining board of the City of New York.

The decision is that a duty rests upon state officers to fix the return which the City of New York shall receive on its property; that it shall raise by tolls what it has an unquestioned right and has determined, to raise by tax.

It substitutes a return to the Interborough of 8% on a valuation not agreed to by the parties, on property mostly the City's own, and called the "cost of reproduction", for the contract provision of a return of $6,335,000 per year, plus 6% on $80,000,000, and actual interest plus 1% (about 7%) on about $40,000,000, advanced by Interborough Company.

It forces upon the municipal authorities the exaction of tolls from the City's inhabitants sufficient to make its investment profitable from revenues; contrary to its policy of not operating for profit, and of apportioning the costs of rapid transit between two classes, one which rides, and the other owning property, greatly enhanced in value by being made quickly accessible; the cost to the former being met by tolls and the latter by taxes.

The Interborough's contract entitles it to the moneys specified therein if, as and when earned. It contracted that the deficits in any year should accumulate and be made up from earnings of later years, with compound interest; and that it was not to receive anything further than its specified return and accumulated deficits with compound interest, except upon the contingency that the return to the City be received in full by it, which, while entirely subordinate to the Interborough's return, was also cumulative.

It was only upon the further contingency, still more remote, after the City's deficits being made good, that there might be profits, in which event there was to be an equal division thereof.

Now, when according to the contract, the Interborough's return and accumulated deficits, with compound interest, *have been paid in full*, the order appealed from takes away from the Interborough all of the incentive for careful and economic operation, removes all of the elements of contingency, and substitutes coercion for contract right; and decrees virtually immediate discharge of the City's deficits by extra tolls from its inhabitants, so that the contingency of profits to the Interborough may be turned into certainty and cash.

In all the particulars specified in this point, the order appealed from assumes powers in the Transit Commission that are precluded by the local self-government provisions of the State Constitution.

Thus local self-government is destroyed, and by judicial decree state officers dominate the city.

The State Constitution provides:

> "All city, town and village officers, whose election or appointment is not provided for by this Constitution, shall be elected by the electors of such cities, towns and villages, or of some division thereof, or appointed by such authorities thereof, as the Legislature shall designate for that purpose. All other officers, whose election or appointment is not provided for by this Constitution and all officers, whose offices may hereafter be created by law, shall be elected by the people, or appointed as the Legislature may direct." (*Art. X, §2.*)

This precludes state domination in local matters.

People ex rel. Town of Pelham v. *Village of Pelham*, 215 N. Y. 374;
People v. *Becker*, 203 N. Y., 201;
People ex rel. Metropolitan St. Ry. Co. v. *Tax Commissioners*, 174 N. Y. 417, 434;
People v. *Coler*, 173 N. Y., 103;
In re Brenner, 170 N. Y., 185;
People ex rel. Rodgers v. *Coler*, 166 N. Y. 1, 10;
People v. *Mosher*, 163 N. Y., 32;
Rathbone v. *Wirth*, 150 N. Y., 459;
People ex rel. Bolton v. *Albertson*, 55 N. Y., 50.

In *People ex rel. Bolton* v. *Albertson, supra*, at p. 56, the Court says:

> "The theory of the Constitution is that the several counties, cities, towns and villages are of right entitled to choose whom they will have to rule over them; and that this right cannot be taken from them and the electors and inhabitants disfranchised by any act of the Legislature, or of any or all the departments of the State government combined.

In *People ex rel. Met. St. Ry. Co.* v. *Tax Comrs., supra*, at p. 434, Judge Vann, after reviewing in detail the home rule provision as it was expressed in the different Constitutions of the state, said:

> "These and other commands of the different Constitutions, when read in the light of prior and contemporaneous history, show that the object of the people in enacting them was to prevent centralization of power in the state and to continue, preserve and expand local self-government."

* * * * * *

> "Local functions, however, cannot be transferred to a state officer. The legislature has the power to regulate, increase or diminish the duties of the local officer, but it has been steadfastly held that this power is subject to the limitation that no essential or exclusive function belonging to the office can be transferred to an officer appointed by central authority. The office may go, but the function must be exercised locally if exercised at all. While no arbitrary line is drawn to separate the powers of local and state officers, the integrity of the local office is protected, with its original and inherent functions unimpaired. It is interference, whether direct or indirect, with the vital, intrinsic and inseparable functions of the office as thus defined and understood that the Constitution prohibits."

The Interborough is employed by the City to render a service for it, namely, to maintain and operate its rapid transit properties. Its preferential of $6,335,000 covered in part its "services in connection with the operation of the property" (R. 555). Its compensation is a matter of agreement, requiring for its fixation the exercise of discretion by the City's officers. It is something that neither the Legislature nor any state officers or agency can do for the City.

In *People ex rel. Rodgers* v. *Coler, supra,* the Court said:

At page 12:

> "The city exists under its ancient charters as modified or enlarged by modern enactments for the purpose of local self-government. While the rights and powers so conferred upon the city are subject to change or modification by the supreme power of the state they cannot be wholly destroyed. *It is not true that the internal affairs of cities in this state are*

absolutely subject to the will of the legislature. The Consitution recognizes their existence as political and corporate bodies and has imposed various restrictions upon the powers of the legislature to interfere in matters of local government. It is without power to appoint city officers, though it may provide for their election by the local electors, or their appointment by some local authority. It cannot dispose of the property of the municipality, nor disburse its revenues, however acquired, for any purpose not pertaining to local administration or local government."

At page 19:

"*With respect to property and contract rights of exclusively local concern, the state has no right to interfere and control by compulsory legislation the action of municipal corporations. The people of the state at large, through their representatives, have no more authority to dictate to a city the form in which its contracts shall be framed or the wages that it shall pay to laborers than they have to dictate to an individual what he shall eat, drink or wear.*"

It is quite manifest that under the New York Constitution, the Legislature is without power to authorize the Transit Commission, through the Public Service Commissions Law or otherwise, to exercise dominion over the City's streets, property and contracts. It has not attempted to do so, but has consistently recognized its own limitations and the City's rights.

Notwithstanding this, the Statutory Court, by the order appealed from, has done the very things that the Legislature not only has not attempted to do, but has no power to do.

City's right of contract destroyed.

There never was a meeting of the minds of contracting parties more positive, more complete, than upon the five-cent fare, which was to prevail without amendment for the definite term of 49 years, subject to the City's option to terminate the operating contracts. The effect of the injunction order is to place the City of New York in the position of having made a contract that was not only never discussed, but was never intended, and to leave the city's huge investment of more than $200,000,000, made for the protection of its inhabitants, in its lines operated by the Interborough, with many miles of its streets used for such construction, wholly in the control and at the disposal of the Interborough Rapid Transit Company. Its property is virtually alienated, its investment impounded, its policy destroyed, *and it is confronted with the utmost uncertainty in regard to contracts that may hereafter be made in connection with such matters, leaving it in dread fear of executing any further contracts for like purposes, lest it be subsequently discovered after the lapse of years that their legal effect is radically different from their intended effect.*

No equity in Interborough's position.

There is no equity in the Interborough's position. It is being paid in full according to the contract, the terms of which were dictated by it.

It is under no oppression from the City of New York. The counterclaim in the City's answer opens the way for complete relief to the Interborough from existing contracts, upon terms just and equitable, to be fixed by the Court.

POINT III.

If it be assumed that it is a public service corporation, as distinguished from a private corporation rendering a service for the City of New York, valid contracts existing between the City of New York and Interborough Rapid Transit Company fix the rate of fare at five (5) cents during the term thereof. Such contracts were made under full and express legislative authority. The validity thereof, and the constitutionality of such legislation, have been adjudicated and sustained by the Court of Appeals of the State of New York.

Where there is a contract, there is no confiscation.

Under contracts Nos. 1 and 2 the Interborough Company is merely the assignee of John B. McDonald, a "person" and Rapid Transit Subway Construction Company, a business corporation, respectively, performing for the City of New York the service of operation, which under No. 3 it has extended to the additions and extensions made to the former lines.

It is the City of New York which is devoting its property and rendering service to its inhabitants; no less so than if it were engaged in direct municipal operation.

But if there were no public property here devoted to a great city purpose, and the Interborough Company were an ordinary public utility devoting its own property to public service, its contracts would be controlling upon it.

The question of confiscation has invariably arisen where private property of a utility company has been involved.

It has been conclusively settled by an unbroken line of decisions of this Court that where there is a contract there is no confiscation.

Detroit v. *Detroit Citizens Ry. Co.*, 184 U. S., 368, 382, 384, 385, 388;

City of Cleveland v. *Cleveland City Ry. Co.*, 194 U. S. 517, 533;

Vicksburg v. *Vicksburg Waterworks Co.*, 206 U. S., 496, 508, 515;

Home Telephone and Telegraph Company v. *City of Los Angeles*, 211 U. S., 265, 270;

Columbus Ry. Power & Light Co. v. *City of Columbus*, 249 U. S., 399, 401;

Georgia Railway & Power Co. v. *Town of Decatur*, 262 U. S., 432, 437, 440;

Superior Water, Light & Power Co. v. *City of Superior*, 263 U. S., 125;

City of Opelika v. *Opelika Sewer Company*, 265 U. S., 215, 217;

San Antonio v. *San Antonio Public Service Company*, 255 U. S. 547, 556;

St. Cloud Public Service Company v. *City of St. Cloud*, 265 U. S., 352, 354.

"It has been long settled that a state may authorize a municipal corporation to establish by an inviolable contract the rates to be charged by a public service corporation for a definite term, not grossly unreasonable in time, and that the effect of such a contract is to suspend, during its life, the governmental power of fixing and regulating the rates. Home Teleph. Co. v. Los Angeles, 211 U. S. 265, 273, 53 L. ed. 176, 182, 29 Sup. Ct. Rep. 50, and cases

there cited. And where a public service corporation and the municipality have power to contract as to rates, and exert that power by fixing the rates to govern during a particular time, the enforcement of such rates is controlled by the obligation resulting from the contract, and the question whether they are confiscatory is immaterial."

St. Cloud Public Service Co. v. *St. Cloud, supra,* and cases cited.

In *San Antonio* v. *San Antonio Public Service Company,* 255 U. S. 547, Mr. Chief Justice White, in the opinion of the Court, from which there was no dissent at p. 556, said:

"The duty of an owner of *private property* used for the public service to charge only a reasonable rate and thus respect the authority of government to regulate *in the public interest,* and of government to regulate by fixing such a reasonable rate as will safeguard the rights of *private ownership,* are interdependent and reciprocal. *Where, however, the right to contract exists and the parties, the public on the one hand and the private on the other, do so contract, the law of the contract governs both the duty of the private owner and the governmental power to regulate.*"

In *Vicksburg* v. *Vicksburg Waterworks Co., supra,* at p. 508 the Court said:—

"That a State may, in matters of proprietary rights, exclude itself from the right to make regulations of this kind, or authorize municipal corporations to do so, when the power is clearly conferred, has been too frequently declared to admit of doubt."

The Court of Appeals of the State of New York has held that the City of New York in building the subways acted in the exercise of its proprietary rights.

Matter of Rapid Transit Railroad Commissioners (Joralemon Street), 197 N. Y. 81, 96.

There can be no question in this Court as to the competency of the State Legislature, "*unless prohibited by constitutional provisions*," to authorize a municipal corporation to make a binding contract as to rates of fare. *Detroit* v. *Detroit Citizens Ry. Co.*, *supra*, p. 382.

St. Cloud Public Service Commission v. *City of St. Cloud*, *supra*, p. 360.

That there were contracts in the present case is undisputed.

All of the contracts and certificates involved herein were made pursuant to the provisions of the Rapid Transit Act; and each of them recites it is a part thereof.

"Determination of any and all questions regarding the legal validity and sufficiency of the formal contract" procured by Interborough in taxpayer's action.

The Interborough in the communication dated February 27, 1912, accompanying its proposal gave notice of its intention to obtain such a decision (R. 544 545).

The question of the city's power to enter into contract #3 was raised in the State courts in a taxpayer's action, brought and prosecuted at the Interborough's instance, and financed with its funds, and to which it, as well as the City of New York, was a party (Answer, R., 749). In such action, the power and authority of the City of New

York and the constitutionality of the Rapid Transit Act, as amended in 1912, were conclusively established.

Admiral Realty Company v. *City of New York*, 206 N. Y. 110.

In its opinion, the Court said (p. 124, italics ours):

"It is proposed to execute the contracts under and in accordance with authority conferred by the legislature under the so-called Rapid Transit Act (Laws of 1891, chapter 4), and its various amendments. Originally it was urged that this act was not broad enough to authorize the contracts, *but since the commencement of the actions amendments have been made which concededly meet and destroy this claim,** and, therefore, the real question is whether the statute attempts to permit something which is in violation of the Constitution and, therefore, is itself unconstitutional."

At p. 126:

"The contract with the Interborough Company provides for the construction and equipment of many miles of municipal subways and elevated road mainly in the borough of Manhattan, at municipal and Interborough's expense; joint operation for *forty-nine years or a shorter period of the same* and also of municipal subways now leased to the Interborough as a single system *subject to a single five-cent fare* * * *."

At p. 128:

"It further decided (referring to *Sun* case) that the municipality need not itself operate such railroads, but might *provide for the operation thereof* by

* This is a reference to the Wagner bill enacted as Ch. 226 Laws of 1912.

some one else under a lease not in perpetuity. Therefore, we start with the incontestable proposition that the city may construct and lease new subways to the Interborough Company.

But, of course, if a city may construct subways it must have the right to make a contract for their building and equipment and provide for repayment to one who furnishes construction or contributes money."

At pp. 129-131:

"Then going a step further with the contract, it appears, at least the state and municipal authorities in the exercise of the judgment and discretion confided to them may say, that *while the subways to be constructed under the proposed contract would to some extent relieve the transportation situation, they would not by themselves furnish such a complete system subject to a single five-cent fare as should be afforded to the inhabitants of a great city; that in order to accomplish this and subserve the general public welfare the new subways should be operated with the old ones as an entire and connected system and subject to a single fare for five cents.* Have the municipal and other authorities under the legislative sanction the right to effect this purpose in the method proposed in other provisions of the contract?

"The city owns the subways already constructed and which it desires to have operated in connection with the ones to be constructed. If it held them entirely free it could make a lease of old and new subways as a single system as it desires to. It has, however, made a lease of these old subways extending under possible extensions for many years and *containing no provisions reserving to the municipality the right to insist upon extensions* or that they shall be operated in connection with the new ones for a single fare. *In order to get rid of these limita-*

tions upon the enjoyment of its own property it proposes for a consideration to secure from the Interborough Company modifications of the present lease of the old subways. These modifications as already stated in the summary of the contracts are a reduction of the term for which the lessee may operate the subways, a consent that the city may exchange such sections of the new subway line on one side of Manhattan for sections of the old line upon the other side as will enable it to secure a complete line on one side, the right to retake the entire subway system at the expiration of a shorter period than is provided for the termination of the lease, and the operation of old and new subways as one system subject to a single five-cent fare. In consideration for these modifications the city agrees that the Interborough Company shall receive another of the preferential payments which has been attacked, namely, from the earnings of the entire system an amount, annually, equivalent to earnings on its present system from which, however, it must pay various charges.

"The question whether the city may make this arrangement with the Interborough Company seems to resolve itself into the fundamental inquiry whether a municipality having made a contract *may subsequently bargain under full legislative authority for a modification of that contract* so that it will be adjustable to altered and then existing circumstances, paying an adequate consideration either for what the other party gives up or for what it secures under the modifications. It seems to me obvious that a municipality has such power. It is an ordinary incident to the power to make a contract that one who has made such a contract which through inadvertent provisions or change in conditions becomes undesirable may bargain for a modification or cancellation thereof. The power to make a contract begets the right to procure

its amendment or rescission. I can see no reason why this principle applicable to an individual should not be applied to a municipality in such a case as the present one and why we should not hold even without guiding authority that a municipality which had the power *to make a contract for the operation of subways* may secure modifications thereof when it has become inadequate to meet existing conditions."

At pages 139-140 (on the question of constitutionality):

"I think, however, that the statute does not come within any constitutional prohibitions of the character urged" * * *.

It is, however, urged that the principles settled by the foregoing and other decisions are not applicable because of the further constitutional provision which was adopted in 1894, * * *.

Again, I disagree with the contention of the appellants. In the first place the Rapid Transit Act was passed before this constitutional provision went into effect. In the second place, the act is not one of those contemplated by the provisions in question."

Notwithstanding the comprehensive manner in which these questions have been settled, the Interborough Company now asserts that while the Rapid Transit Act, in case of municipal construction and contract operation, required the contracts to contain provisions as to the rates of fare, the rate fixed in the contract *was by implication*, subject to abrogation at the pleasure of the Interborough Company. (R. 52, 53.)

This feature of the case is controlled by the decisions of this Court in *Cleveland* v. *Cleveland City Railway Company*, *supra*, and *Columbus Railway & Power Company* v. *Columbus*, *supra*.

In the *Cleveland* case, at page 536, the Court said (italics ours):

> "In reason, the conclusion that contracts were engendered, would seem to result from the fact that the provisions as to rates of fare were fixed in ordinances *for a stated time* and *no reservation was made of a right to alter*, that by those ordinances existing rights of the corporations were surrendered, benefits were conferred upon the public, and obligations were imposed upon the corporations to continue those benefits during the stipulated time."

In the *Columbus* case, at p. 408, the Court quoted the foregoing from the *Cleveland* case, and said that the ordinances there referred to

> "obligated the company *during the life of the franchise*", etc.

and that the company is authorized to charge certain fares

> "*during the term named, and no more.*"

The striking similarity of this language to that contained in contracts Nos. 1, 2 and 3, leaves it impossible to distinguish the case at bar from those cited.

The afterthought.

The Interborough's present contention is an afterthought, based upon expressions of the New York Court of Appeals in the *Nixon* case, decided July 7, 1920, and which related to an ordinary street surface railway franchise, not affected by the Rapid Transit Act, and in which franchise and property used thereunder the City of New York had no pecuniary or property interest. The allegations of the complaint (R. 52-53) (quoted, *supra*, pp. 3-4)

attempt to paraphrase the language of the Court of Appeals and render it applicable to Contracts Nos. 1, 2 and 3. (See *Nixon* opinion, *post*, p. 130).

Contract No. 3 was entered into on the basis of the decision in the *Admiral Realty* case.

The ordinary principles of estoppel would seem to be a sufficient answer to such a claim from the Interborough Company, in view of its insistence that contract #3 contain a provision for a five (5) cent fare for 49 years, subject to earlier termination by recapture, or, as expressed in the contract:

> "The lessee shall, *during the term of the contract*, be entitled to charge for a single fare upon the railroad and the existing railroads the sum of five (5) cents *but not more*." Art. LXII.
>
> *City of N. Y.* v. *Delli Paoli*, 202 N. Y. 18, 23;
> *Mayor, etc. of N. Y.* v. *Sonneborn*, 113 N. Y. 432.

Not only would there seem to be an estoppel from the conduct and commitment of the parties in carrying out the projected construction and operation of the new rapid transit lines, but, as pleaded in the answer of the City of New York, there is an estoppel of record by the adjudication in the *Admiral Realty Company* case, to which action both the City of New York and the Interborough Rapid Transit Company were parties.

That case is *res adjudicata* upon the question of the power of the City to make a binding contract containing a provision for a five-cent fare during the term thereof.

> *Ashton* v. *City of Rochester*, 133 N. Y. 187;
> *People's Gas & Elec. Company* v. *City of Oswego et al.*, 207 App. Div. 134, 141; aff'd 238 N. Y. 606.

POINT IV.

The Rapid Transit Act, pursuant to which such contracts and Elevated Railroad Certificates were made, is a comprehensive special statute excluding any possible subordination to the Public Service Commissions Law.

We have already outlined the purpose and fare provisions of the Rapid Transit Act (*supra*, pp. 6-25).

Throughout the Rapid Transit Act run the expressions "with the approval of the Board of Estimate and Apportionment" and "with like approval"; the latter expression referring to a preceding provision for "the approval of the Board of Estimate and Apportionment."

That the powers of the Public Service Commission, its predecessors and successors, under the Rapid Transit Act, in relation to railroads constructed with municipal funds to effectuate a city purpose are contractual and not regulatory, clearly appears from the fact that the powers of any such body thereunder, are to be exercised only with the approval of the Board of Estimate and Apportionment of the City of New York.

If the Public Service Commission, its predecessor or successors were vested with the police power to regulate rates and service on the railroads constructed and operated under the contracts, made with the City of New York pursuant to the Rapid Transit Act, it could not function in such regulatory capacity, for it could only act "with the approval of the Board of Estimate and Apportionment."

Similarly if contracts made by the City of New York for the operation of its own railroads and containing terms fixing rates of fare, can be subverted by the Public Service

Commission, acting under the Public Service Commissions Law, the Board of Estimate and Apportionment cannot function. It would be idle to expect it to do so under such circumstances.

Among the provisions of the Rapid Transit Act providing for action by the Rapid Transit Railroad Commissioners or their successors, which contain the limitation that such action be only with the approval of the Board of Estimate and Apportionment, are the following: Sections "4", "5", "22", "23", "24", "24-a", "26", "27", "28", "30", "31", "32", "33", "34", "35", "36", "37" and "38".

Rapid Transit Act untouched by Public Service Commissions Law.

The Public Service Commissions Law (Chapter 429 of the Laws of 1907), created two Public Service Districts to be known as the "First District" (which comprised New York City) and the "Second District" (which included the remainder of the State). (Sec. 3).

A Commission of five members to be appointed by the Governor, was established for each District (Sec. 4) upon whom were conferred regulatory powers in relation to certain public utilities.

In Section 5, subdivision "6", it was provided:

> "6. *And in addition thereto*, the commission in the first district shall have and exercise *all powers heretofore conferred upon the board of rapid transit railroad commissioners* under chapter four of the laws of eighteen hundred and ninety-one, entitled 'An act to provide for rapid transit railways in cities of over one million inhabitants,' and the acts amendatory thereto."

Section 83 provided:

> "§83. *Board of rapid transit railroad commissioners abolished; effect thereof.*—On and after the taking effect of this act the board of rapid transit railroad commissioners shall be abolished. *All the powers and duties of such board conferred and imposed by any statute of this state shall thereupon be exercised and performed by the public service commission of the first district.*"

Section 87 provides:

> "§87. *Repeal.*—The following acts and parts of acts, together with all other acts amendatory of such acts, and all acts and parts of acts otherwise in conflict with this act, are hereby repealed:
>
> Laws of 1905, chapter 737.
> Laws of 1905, chapter 728.
> Laws of 1904, chapter 158.
> Laws of 1902, chapter 373.
> Laws of 1896, chapter 456.
> Laws of 1894, chapter 452.
> Laws of 1892, chapter 534.
> *Laws of 1891, chapter 4, sections 1, 2 and 3.*
> Laws of 1890, chapter 565, sections 150 to 172 inclusive.
> Laws of 1890, chapter 566, sections 62, 63 and 64."

The action of the Legislature in thus transferring to the Public Service Commission, in the First District, all of the powers conferred and duties imposed upon the Rapid Transit Railroad Commissioners under the Rapid Transit Act, by both Sec. 5, subd. 6, and Sec. 83, is susceptible of no other construction or interpretation than a deliberate legislative intent, that *all of the powers and duties of the Rapid Transit Act were to remain in full force and effect, without any suggestion or implication of impairment by*

or subject to anything in the Public Service Commission Law.

The language is "*in addition thereto*". It is not "*subject thereto*".

There is no exception, there is no qualification, there is no proviso. In the face of such explicit, clear and unambiguous expressions there is no room for implications, nor is there room for construction. The intention is manifest.

This intention is fortified and emphasized by the provisions of the repeal provision in Sec. 87 above quoted, by which, in specifying the acts repealed, *only Sections 1, 2 and 3 of the Rapid Transit Act (Chap. 4 of the Laws of 1891) relating to the name, and method of appointment of the former commissioners, were affected.*

All of the other acts mentioned in the repeal schedule are parts of the Railroad Law except two which relate to gas and electricity.

Only the year before the passage of the Public Service Commissions Law, important and extensive changes had been made in the Rapid Transit Act, to enable the City of New York to provide additional rapid transit facilities by the use of public moneys for both construction and equipment and to be operated by contract if possible, and if necessary by direct municipal action without a contract (*Laws 1906, Ch. 472*).

After the lapse of one year after the passage of the Public Service Commissions Law the Rapid Transit Act was amended generally, its action amounting to a general revision thereof (*Laws 1909, Ch. 498; supra*, p. 22).

In *Admiral Realty Company* v. *City of New York, supra*, at page 141, the Court said:

> "But by chapter 498 of the laws of 1909 the Rapid Transit Act was revised. * * * By the re-arrange-

ment of section 65 all acts and parts of acts local or general inconsistent with the act as amended by the amendments of 1909 were expressly repealed."

The claim that the Public Service Commissions Law qualified the Rapid Transit Act *is totally destroyed by the provisions in this repealing clause in Chap. 498 of the Laws of 1909.*

The revision of the Rapid Transit Act, with this repeal clause, is destructive of any claim that by *implication* contracts under the Rapid Transit Act were subject to the Public Service Commissions Law. Such an implication is manifestly *inconsistent* with the express provisions of the Rapid Transit Act and, therefore, clearly within the scope of this repeal clause.

Chap. 498 of the Laws of 1909 took effect more than two years after the Public Service Commissions Law. It was a later Act.

If there had been any conflict in their provisions, such later act would necessarily control.

At the 1910 session of the Legislature, the fare and service provision above quoted, and which in 1909 was renumbered as subdivision 2 of Section 27 of the Rapid Transit Act was further amended by adding at the end thereof a provision that any contract may contain a reservation of trackage rights.

As so amended, subdivision 2 was re-enacted without further change (Chapter 504, Laws of 1910).

The resolution of the Board of Estimate and Apportionment urging upon the Legislature "the importance of the prompt passage of Senate Bill No. 1277 amending the Rapid Transit Act and introduced by Senator Wagner on March 18th" in one of its preambles recited that

> "Whereas, The Public Service Commission for the First District and the Board of Estimate and Apportionment of The City of New York have under consideration plans for the construction and operation of a system of subway and rapid transit lines that will extend rapid transit facilities to every part of the city and secure to the people an extension of service that will increase three fold the area throughout which passengers may be carried *for a single five-cent fare*" (R. 565).

The Legislature therefore had the purposes of the bill brought clearly to its attention. Doubtless the proposed contracts were also before the Legislature in their entirety. Among the extensive amendments made by the bill was a long insertion in subdivision 2 of Section 27 the fare and service provision of the Rapid Transit Act. The number of this subdivision was changed to 3, and the new matter placed immediately ahead of the amendment of 1910. As thus amended the subdivision was re-enacted without change (Laws 1912, Ch. 226).

This was the third time this provision had been amended and re-enacted within three years, all subsequent to the enactment of the Public Service Commissions Law.

Every line of the amended act is pregnant with the idea of contract. As to some matters such contract *may* provide; as to others it *shall* provide. Among the latter class is the provision

> "Every such contract *shall contain* such terms and conditions as to rates of fare to be charged and the character of services to be furnished."

Regulation repelled.

The elaborate amendments made to the Rapid Transit Act by the Wagner bill (Ch. 226 Laws 1912) with their various and explicit provisions with relation to contracts be-

tween The City of New York, the Interborough and other companies, and the modification of existing contracts, completely repel the suggestion that there was any intention to throw such contracts wide open to the subsequent revision of a state regulatory body, by whose action the whole policy authorized to be pursued by the City of New York, involving its great city purpose and huge investment of public moneys, might be flouted and cast aside, as the Interborough Rapid Transit Company here attempts.

Such a revision would have stirred more controversy than the original negotiations for the Dual Contracts #3 and #4 and related certificates.

This would take place before the Public Service Commission, or its successor, *and according to the notion now advanced by the Interborough Company, the very body that in one capacity (under the Rapid Transit Act) negotiated the contracts, and obtained the approval of the Board of Estimate and Apportionment, in another capacity (under Public Service Commissions Law) and without such approval would be required to pass upon the reasonableness of its own acts and the Board of Estimate and Apportionment in making the contract.* A claim of confiscation might then bring it to a Statutory Court.

To assume a legislative intent to authorize the City of New York to fix a rate of fare merely temporary in character, and subject to abrogation and revision up or down, at the instance of the Interborough or other contractors, would do the greatest violence to the plain language of the act, as well as the intelligence of the Legislature. It would be as preposterous as an assertion of the Interborough Rapid Transit Company that it was jeopardizing its profit of $6,335,000 per year produced by the five (5) cent fare on existing lines, by bargaining for legislative authority under

which that huge profit would be the greatest lure for a rate reduction proceeding.

On its face, this huge profit revealed the five (5) cent fare under contracts #1 and #2 as being unreasonable, unjust, and oppressive, the product of indecent crowding; unless protected by contract obligation. To say that the Interborough was offering absolution from such contract obligation in order that the five cent fare might be revised downward, is to raise a question as to one's sanity. Yet, this is the precise claim made by it.

It is contradicted by the declaration of the Interborough, May 9, 1911, four years after the Public Service Commissions Law took effect, that it was willing to place "certain *contractual* limitations upon future profits" (R. 349, 350).

Public Service Commissions Law harmonized with Railroad Law but no attempt made to affect Rapid Transit Act.

In this connection and as further evidencing the utter absence of any legislative intention to affect the Rapid Transit Act by anything in the Public Service Commissions Law, attention is directed to what was done in harmonizing such statute and the Railroad Law, the provisions of which were the occasion for the amendments in Section 49 of the Public Service Commissions Law.

Where the Public Service Commissions Law was intended to control over the provisions of the Railroad Law, the latter was amended (Laws 1910, Ch. 481) by the insertion of the words "subject to the provisions of the Public Service Commissions Law". Several instances of this are pointed out in the opinion in *People ex rel. Ulster and Delaware Railroad Company* v. *Public Service Commission*, 171 App. Div. 607.

Nothing of this kind was done in the case of the Rapid Transit Act. But at the same session the Rapid Transit Act

was also amended in other respects, the amendment being made to the very section that requires every contract for operation of city owned lines to contain terms and conditions as to rates of fare, *i. e.*, sec. 27, subd. 2. It authorized the insertion in such contracts of trackage agreements. Such amendment was made by chapter 504 of the Laws of 1910. The Rapid Transit Act was also amended by Chapters 205, 505 and 506 of the Laws of 1910 in matters not here material. But at no time was there any subjection or subordination of the Rapid Transit Act to the Public Service Commissions Law.

Rapid Transit Act and Constitution repeatedly amended to effectuate City purpose.

Since the Rapid Transit Act was first enacted it has been amended approximately thirty times by the New York legislature, such amendments, in each instance, being to enlarge the power of the City of New York to provide rapid transit facilities for its ever-increasing and congested population. The Constitution of the State of New York has been several times amended to the same end. As recently as November, 1927, the people of the State of New York approved of an amendment to the Constitution to empower the City of New York to use its credit to the extent of $300,000,000 for the provision of new rapid transit facilities without regard to any limitations therefore existing on the city's debt incurring power (Art. VIII, Sec. 10-a).

Public Service Commissions Law subordinate to special statutes.

In *City of New York* v. *Brooklyn City R. R. Co.*, 232 N. Y. 463 (decided February 3, 1922), in reversing the Appellate Division, the Court of Appeals held that the provisions of the Public Service Commissions Law, in relation to a certificate for public convenience and necessity,

had no application to the City of New York in its ownership and operation of the railways over the Williamsburg Bridge. At page 470, the Court says (italics ours):

> "In order to operate the railroad and to construct the necessary trackage, no certificate of public convenience and necessity nor permission of the public service commission is required. The right and franchise to operate its railroad under contracts under the *special statute* vested in the city as a municipal corporation, not as a railroad corporation or private common carrier (*Sun Printing & Publishing Assn. v. Mayor, etc., of N. Y.*, 152 N. Y. 257, 267), and was exercised until shortly before the commencement of this action. (*Schinzel* v. *Best*, 45 Misc. Rep. 455; 109 App. Div. 917.) The entire scheme under which the bridge was constructed indicates plainly that *the city's authority comes direct from the legislature* and not through the public service commission, and that convenience and necessity and permission were all decreed in 1895 and 1896 by legislative fiat."

This case is very important as it illustrates the fact that the Rapid Transit Act is wholly independent of the Public Service Commissions Law in another direction, *i. e.*, that the routes and roads planned and projected under the Rapid Transit Act require no certificate of public convenience and necessity under the Public Service Commissions Law, whether they be for city-owned lines or elevated railroad extensions.

So that instead of the Rapid Transit Act being subordinate to the Public Service Commissions Law, the contrary is the fact.

Reasonable construction required.

The Rapid Transit Act is too plain to admit of construction.

Where a statute is susceptible of two constructions, by one of which grave and doubtful constitutional questions arise, and the other of which such questions are avoided, the Court will adopt the latter.

Harriman v. *Interstate Commerce Commission*, 211 U. S. 407;
United States v. *Delaware & Hudson Company*, 213 U. S. 366, 408;
United States v. *Bennett*, 232 U. S. 299, 303.

In *Kings County Lighting Company* v. *City of New York*, 176 App. Div. 175, at p. 180, the Court says:

> "Statutes should be construed, if possible, so as not to repeal other legislative acts by implication, and should be given a reasonable intendment."

In *Durgee* v. *The Mayor*, 96 N. Y. 477, at pp. 495-496, the Court says:

> "The rule by which this ordinance is to be construed is such as applies to the interpretation of the acts of other legislative bodies, and is that which shall best effectuate the intent of its authors. The reason and object of an act are to be regarded to arrive at its meaning, and while it is not competent to interpret that which has no need of interpretation, or to deny to clear and precise terms the sense which they naturally present, yet when such terms lead to manifest injustice and involve an absurdity, law and equity both require us to give such an effect to the language used as will accomplish the obvious intent of the legislature. Watervliet Turnpike Co. v.

McKeon, 6 Hill 616; People *v.* Utica Ins. Co., 15 Johns. 358; 8 Am. Dec. 243; Holmes *v.* Casey, 31 N. Y. 289; People *v.* Draper, 15 id. 532."

In *Washington* v. *Miller*, 235 U. S. 422, at p. 428, the Court says:

> "In these circumstances we think there was no implied repeal, and for these reasons: First, such repeals are not favored, and usually occur only where there is such an irreconcilable conflict between an earlier and a later statute that effect reasonably cannot be given to both (*United States* v. *Healey*, 160 U. S. 136, 146; *United States* v. *Greathouse*, 166 U. S. 601, 605); second, where there are two statutes upon the same subject, the earlier being special and the later general, the presumption is, in the absence of an express repeal, or an absolute incompatibility, that the special is intended to remain in force as an exception to the general (*Townsend* v. *Little*, 109 U. S. 504, 512; *Ex parte Crow Dog*, *Id.* 556, 570; *Rodgers* v. *United States*, 185 U. S. 83, 87-89); and, third, there was in this instance no irreconcilable conflict or absolute incompatibility, for both statutes could be given reasonable operation if the presumption just named were recognized."

In *United States* v. *Mammoth Oil Co.*, 14 Fed. (2d) 705, at page 715, the Court says:

> "In Witte *v.* Shelton *et al.*, 240 F. 265, 268, 153 C. C. A. 191, 194, this court said: 'Specific legislation upon a particular phase of a single subject is not affected by a subsequent law relating to a general subject which neither refers to the earlier law nor is repugnant to nor inconsistent with it, but the two laws must stand together, the former as the law of its specific phase of the subject, and the latter as the

general law relating thereto.' Walla Walla City *v.* Walla Walla Water Co., 172 U. S. 1, 19 S. Ct. 77, 43 L. Ed. 341; Townsend *v.* Little & Others, 109 U. S. 504, 512, 3 S. Ct. 357, 27 L. Ed. 1012; Kepner *v.* United States, 195 U. S. 100, 125, 24 S. Ct. 797, 49 L. Ed. 114, 1 Ann. Cas. 655; Rodgers *v.* United States, 185 U. S. 83, 87, 22 S. Ct. 582, 46 L. Ed. 816; Hemmer v. United States, 204 F. 898, 903, 123 C. C. A. 194; United States *v.* Matthews, 173 U. S. 381, 19 S. Ct. 413, 43 L. Ed. 738.

"This special statute, not repealing the general statutes, the two stand together, one as the law relating to a special thing, viz. the naval reserves; the other relating to general public land matters. It was therefore unnecessary that there be competitive bidding or advertising as to the making of the lease and contract, and other statutes with relation to the method of transacting the general public business of the United States were not applicable to this situation, the special statute fully covering the same."

The Rapid Transit Act, like the Williamsburg Bridge Act, is a special statute which controls over the general statute, the Public Service Commissions Law.

City of New York v. *Brooklyn City R. R. Co.*, 232 N. Y. 463, 470 (*supra*, pp. 103-104).

POINT V.

The Legislature has not at any time empowered the Public Service Commission to regulate the rates of fare agreed upon in contracts made by the City of New York pursuant to the Rapid Transit Act.

Unless the Public Service Commission Law authorized a change in a fare fixed by contract made pursuant to the Rapid Transit Act, it is wholly immaterial what procedural steps the Interborough Company may have taken or attempted, to invoke the jurisdiction of the regulatory tribunal.

In its applications made respectively in 1920 and 1922, the Interborough Company based its claim for relief on Section 49 of the Public Service Commissions Law (R. 1023-1024).

In 1928, it claims to have proceeded under both Sections 29 and 49.

Section 29 Inapplicable.

Section 29 of the Public Service Commissions Law relates to changes in rates provided in schedules or tariffs theretofore filed and published. *People ex rel. Huff* v. *Warden, etc.*, 118 Misc. (N. Y.) 681, 683.

It has nothing to do with rates fixed by contract or agreement.

The section shows on its face that it relates "to changes in schedule". It provides that no change shall be made in any rate of fare

> "which shall have been filed and published by a common carrier in compliance with the requirements of this chapter",

except in the manner therein provided.

(Although the Interborough claims to have filed a schedule or tariff of the rates of fare provided in the contracts between it and the City of New York, made pursuant to the Rapid Transit Act, its failure to do so would not have impaired the obligations of the contracts providing for a five (5) cent fare.)

It is to be remembered that under Contract No. 1 the Interborough is the assignee of McDonald an individual contractor and under No. 2 of Rapid Transit Subway Construction Company, a business corporation.

Section 49 Sole Reliance and Also Inapplicable.

Section 49, then, must be the sole reliance of the Interborough; and unless that section authorizes a change in rapid transit contracts, all of the assumptions of the Interborough Company fail.

Section 49 as enacted by Chapter 429 of the Laws of 1907.

Section 49 limits the authority of the Commission to "any common carrier, railroad corporation or street railroad corporation subject to its jurisdiction". When first enacted in 1907, it authorized regulation only of rates established by a schedule or published tariff:

> "The commission shall determine the just and reasonable rates, fares and charges to be thereafter observed and in force as the maximum to be charged

for the service to be performed, and shall fix the same by order to be served *upon all common carriers, railroad corporations* or *street railroad corporations*, by whom such rates, fares and charges are thereafter to be observed."

That this has no application to the City of New York further appears from *City of New York* v. *Brooklyn City R. R. Co.* (*supra*, pp. 103-104):

> "The right and franchise to operate its railroad under contracts under the *special statute* vested in the city as a *municipal corporation, not as a railroad corporation or private common carrier* (*Sun Printing & Publishing Assn.* v. *Mayor, etc., of N. Y.*, 152 N. Y. 257, 267)."

Chapter 480 of the Laws of 1910.

In 1910, Section 49 was amended by the insertion of provisions that when the Commission was of the opinion that (italics indicate new matter):

> "*the maximum rates, fares or charges, chargeable by any such common carrier, railroad or street railroad corporation are insufficient to yield reasonable compensation for the service rendered, and are unjust and unreasonable*, the commission shall *with due regard among other things to a reasonable average return upon capital actually expended and to the necessity of making reservation out of income for surplus and contingencies*, determine the just and reasonable rates, fares and charges to be thereafter observed and in force as the maximum to be charged for the service to be performed, *notwithstanding that a higher rate, fare or charge has been heretofore authorized by statute*, and shall fix the

> same by order to be served upon all common carriers, railroad corporations or street railroad corporations by whom such rates, fares and charges are thereafter to be observed."

The new matter in relation to "reasonable compensation" and "reasonable average return upon capital actually invested", manifestly has no relation to the City's subways.

The provision "*notwithstanding that a higher rate, fare or charge has been heretofore authorized by statute*" enlarged the jurisdiction of the Commission so that, in addition to changes in rates established by schedules or tariffs, its authority was extended to include change in a rate or fare "heretofore authorized by statute".

These changes were not made with reference to rapid transit railroads of the City of New York, but were made with special reference to steam railroad and street surface railway provisions of the Railroad Law, which was amended on the same day, so as to expressly provide that its provision for rates of fare be

> "subject to the provisions of the Public Service Commissions Law."
>
> (See *People ex rel. Ulster & Delaware Railroad Company* v. *Public Service Commission* [decided January, 1916], 171 App. Div. 607, at pp. 608, 609; affirmed in the Court of Appeals, 218 N. Y. 643.)

Section 181 of the Railroad Law related to street surface railways.

Section 49, as thus amended, did not authorize regulation of rates of fare fixed by agreement.

Section 181 of the Railroad Law did not authorize changes in rates established by agreement.

Such was the ruling of the Court of Appeals in *Matter of Quinby* v. *Public Service Commission*, 223 N. Y. 244 (decided April 5, 1918), quoted *post*, p. 124.

Referring to the first of the amendments made in 1910, with reference to the "reasonable average return upon capital actually expended":

It is manifest that this does not refer to rapid transit railroads in the City of New York, constructed at public expense. The Rapid Transit Act contained no such requirement.

In *Sun Publishing Assn.* v. *Mayor, etc.*, 8 App. 230, at p. 238, the Court, said:

> "The true test is that which requires that the work shall be essentially public and for the general good of all the inhabitants of the city. *It must not be undertaken merely for gain or for private objects. Gain or loss may incidentally follow, but the purpose must be primarily to satisfy the need or contribute to the convenience of the people of the city at large.*"

The constitutional amendment, approved in 1909, effective January 1, 1910 (Art. VIII, §10), expressly sanctioned the financing of rapid transit railways by the City of New York without profit; the only consequence being to enlarge its debt.

It is manifest, therefore, that Section 49 had no relation whatever to the "reasonable average return upon capital actually expended" for rapid transit subways of the City of New York.

Chapter 546 of the Laws of 1911.

This amendment to Section 49 struck out the words "the capital actually expended", and substituted therefor the words "the value of the property actually used in the public service". This manifestly had no relation to rapid transit railroads of the City of New York.

Chapter 134 of the Laws of 1921.

This act provided for the so-called readjustment plan. It amended Section 49 so as to extend the jurisdiction of the Public Service Commission as follows (Italics indicate new matter):

> "Notwithstanding that a higher *or lower* rate, fare or charge has been heretofore prescribed by *general or special* statute, *contract, grant, franchise, condition, consent or other agreement, and shall fix the same by order*" etc.

The foregoing amendment was made in connection with the provision for a readjustment plan, to be consented to by the parties participating.

The readjustment plan was very involved and is of no present materiality. Briefly speaking, it contemplated that title to all privately owned railroads, street railroads, and bus lines, in New York City be vested in the City of New York, in exchange for securities of a city controlled corporation, upon a valuation acceptable to the owners of the properties so acquired, which were thereupon to be leased to the former owners or new companies, and rates of fare maintained on a sliding scale to pay an agreed return upon the securities issued to acquire such title. To give effect to the readjustment plan, required the consent of each of the railroads affected thereby (Laws 1921, Ch. 134, Sec. 69) and the Board of Estimate and Apportionment (L. 1925, Ch. 641); *post*, p. 119. Although nearly eight years have elapsed, no such plan has ever been adopted.

Chapter 335 of the Laws of 1921.

This act amended subdivision 1 of Section 49 in relation to the basis of valuation, but it made no change in the provision last above quoted.

Chapter 153 of the Laws of 1922.

While this bill was pending in the legislature Interborough Rapid Transit Company prepared an application to the Transit Commission for an increase in the rates of fare in contracts #1, #2 and #3 and the elevated railroad certificates, contained in the agreements with the City of New York made pursuant to the Rapid Transit Act. This application reached the Transit Commission on March 22, 1922 (R. 870), at a time when the bill had passed both branches of the legislature. Hon. Nathan L. Miller was then governor, and it was at his instance that the legislature had enacted Chapter 134 of the Laws of 1921, containing both the article for a re-adjustment plan and the amendment to Section 49 of the Public Service Commissions Law quoted *supra* (p. 113). He lost no time, however, in signing the bill which became Chapter 153 of the Laws of 1922 effective before the end of the day on which the Interborough's application was filed.

By this act, Section 49 of the Public Service Commissions Law was amended by inserting at the end thereof, the following (italics indicating new matter):

> "*provided, however, anything herein contained to the contrary notwithstanding, that, except in the case of a common carrier other than a street railroad corporation, not proposed by the commission to be included*

in the plan of readjustment under the provisions of article six of this chapter, the transit commission shall not increase or authorize the increase of any rate of fare prescribed by any such general or special statute, contract, grant, franchise, condition, consent or other agreement except as part of and as may be provided in such plan of readjustment."

The obvious purpose of this amendment was to confirm the legislative intent to limit any increase in any

> "rate of fare prescribed by any such general or special statute, contract, grant, franchise, condition, consent or other agreement"

to a provision in a plan of readjustment. No such plan has ever been adopted.

Chapter 891 of the Laws of 1923.

By this, the addition made to Section 49 by Chapter 153 of the Laws of 1922 was eliminated, and there was also eliminated from Section 49 the provision added by Chapter 134 of the Laws of 1921, so that, as amended such provision reads as follows (brackets indicating omissions and italics new matter):

> "notwithstanding that a higher [or lower] rate, fare or charge has been heretofore *authorized* [prescribed] by general or special statute, [contract grant, franchise condition, consent or other agreement] and shall fix the same by order to be served upon all common carriers," etc.

This put Section 49 of the law back where it was as amended by Chapter 480 of the Laws of 1910; the only

verbal difference being that the latter act embodied the words "by statute" and the act of 1923 used the words "by general or special statute".

People ex rel. Village of Mamaroneck v. *Public Service Commission* and *New York and Stamford Railway Company*, 238 N. Y. 588 (decided June 3, 1924).

Matter of Village of Brownsville v. *Public Service Commission*, 209 App. Div. 640 (decided June 27, 1924, 3rd Dept.).

People ex rel. Village of Brownsville v. *Public Service Commission*, 240 N. Y. 586 [decided March 5, 1925].

It was with reference to this former state of the law that the Court of Appeals decided the *Quinby* case (*post*, pp. 125-126).

And where the Court further said:

> "It is impossible to find a word in the statute which discloses the legislative intent to deal with the matter of rates fixed by agreement with local authorities."

And further:

> "It may well be inferred that the Legislature excluded them from consideration by failure to mention them and that it has made no attempt to turn them over to the Public Service Commission for revision."

And further

> "The authority of the Commission to regulate rates in such cases * * * should fairly appear before it is assumed to exist."

These observations constitute principles of construction, applied by the Court of Appeals of the State of New York, to determine legislative intent.

A mere inspection of the provisions in Section 49 of the Public Service Commissions Law, as originally enacted in 1907, and as modified by the several amendments subsequently, suffices wholly to negative the assumption of the Interborough Company of any jurisdiction to entertain an application for regulation of the rates of fare provided in the contracts made pursuant to the Rapid Transit Act between the City of New York and Interborough Rapid Transit Company.

Chapter 573 of the Laws of 1924.

By Chapter 573 of the Laws of 1924, the Public Service Commissions Law was amended by the addition of a new article "VIII", embracing sections 130 to 144, inclusive.

By Section 130 a board of transportation was established in the City of New York, consisting of three members to be appointed by the Mayor.

In Section 134, as so added, it was provided:

> "§134. *Powers and duties of board of transportation.* The powers and duties of the board of rapid transit railroad commissioners under * * * the rapid transit act, * * * are hereby transferred to and conferred upon the board of transportation, together with such other and necessary powers as may be requisite for the efficient performance of the duties imposed upon it by reason of such transfer; * * * it being the intention of this act to confer on the board of transportation the powers and duties

under the Rapid Transit Act to construct or complete the construction of any road or roads remaining to be constructed by the city under any such contract, and to construct or construct and equip any new road or roads and to lease or operate such new road or roads *and to retain in the Transit Commission the powers and duties not so transferred.*"

A comparison of Section 134 with the Rapid Transit Act shows that the only provisions thereof under which any power or duty survives to the transit commission are Sections 9, 24, sub. 4, Section 29, subd. 3 and Section 34, subd. 3.

Section 9 of the Rapid Transit Act provides:

> "It may in the name of and in behalf of the said city bring an action of specific performance or may apply by mandamus to compel the performance within said city by any corporation or person of any duty or obligation with reference to or arising out of the construction or operation of any railroad under, or by reason of, any grant made or right acquired under this act or the acts amendatory hereof or supplementary hereto, or out of or by reason of any contract made or authorized by any board of rapid transit railroad commissioners within its city or the public service commission, or it may in behalf of and in the name of said city bring actions to recover damages for any violation of contract or duty, or for any wrong committed by any such corporation or person by reason of any non-performance or violation of duty under the provisions of this act or under any contract or stipulation made in pursuance of any provisions of this act." [*As amended by* L. 1892, *ch.* 556, §2; L. 1894, *ch.* 752, §6; L. 1895, *ch.* 519, §5 *and* L. 1909, *ch.* 498, §4.]

By Section 24, subd. 4, the contracts constituted by the elevated railroad certificates are made "enforceable by the

commission acting in the name of and in behalf of the said city".

By Section 29, subd. 3, in relation to contracts for construction and operation of rapid transit railroads, it is provided that the commission "may bring such action or actions in the name and in behalf of the city as may be necessary for the sufficient and just protection of the rights of the city".

By Section 34, subd. 3, "Unless otherwise provided by law the commission with the approval of the board of estimate and apportionment" may exercise the right of recapture, whenever it exists.

This express preservation of its right to enforce the contracts under the Rapid Transit Act is totally destructive of the idea that the Transit Commission may regulate them under the Public Service Commissions Law.

Chapter 641 of the Laws of 1925.

This added a new section to the Public Service Commissions Law, relating to the readjustment plan and expressly prohibiting the adoption of any such plan without the consent and approval of the Board of Estimate and Apportionment of the City of New York.

> "§112. *Approval of contracts to effectuate plans of readjustment.* Anything contained in this chapter to the contrary notwithstanding, the transit commission shall not execute and deliver any contract or contracts to effectuate any plan of readjustment therein provided for *without obtaining the consent and approval of the board of estimate and apportionment, or other local authority of such city.*"

Leaving out of view for the moment the question whether under the State or Federal Constitutions, the Legislature over the objection of the City, could itself regulate, release or change the rates of fare in the contracts made by the City of New York pursuant to the Rapid Transit Act, the most that can be said for the claim of Interborough Rapid Transit Company is that the Legislature has never attempted to do so directly, and, if it could do so, it has not empowered the Transit Commission or any of its predecessors, to regulate, release or change such rates.

In this phase, the case is controlled by the principle applied in *Southern Utilities Co.* v. *Palatka*, 268 U. S. 232, where, at p. 233, the Court said:

> "Without considering whether an agreement by the company in consideration of the grant of the franchise might not bind the company in some cases, even if it left the city free, *it is perfectly plain that the fact that the contract might be* overruled by a higher power *does not destroy its binding effect* between the parties when it is left undisturbed. Georgia R. & Power Co. v. Decatur, 262 U. S. 432, 438, 67 L. ed. 1065, 1073, 43 Sup. Ct. Rep. 613; Opelika v. Opelika Sewer Co., 265 U. S. 215, 218, 68 L. ed. 985, 987, 44 Sup. Ct. Rep. 517. *Such a notion, logically carried out, would impart new and hitherto unsuspected results to the power to amend the Constitution or to exercise eminent domain. There is nothing in this decision inconsistent with* Southern Iowa Electric Co. v. Chariton, 255 U. S. 539, 65 L. ed. 764, 41 Sup. Ct. Rep. 400; San Antonio v. San Antonio Pub. Serv. Co., 255 U. S. 547, 65 L. ed. 777, 41 Sup. Ct. Rep. 428; and Ortega Co. v. Triay, 260 U. S. 103, 67 L. ed. 153, 43 Sup. Ct. Rep. 44."

It was because of the entire absence of authority under the Public Service Commission Law, to regulate the fares fixed in the contracts made pursuant to the Rapid Transit Act, that the Interborough Company was driven to the invention of "implications" and the "In the presence of" theory, and the attempt to support it by the *Nixon case*.

It is wholly immaterial, therefore, what steps were taken by the Interborough Company to invoke the supposed jurisdiction of the Transit Commission; whether by filing a schedule under Section 29, or an application under Section 49; or both. All were equally futile; and nothing that the Transit Commission did or omitted added to the Interborough's supposed rights.

POINT VI.

The decisions of the State Courts in gas and street surface railway cases cited in the opinion, do not sustain the conclusion of the Court below but are contrary thereto.

In particular, the decisions in the Garrison Cases on re-argument are fatal to the claims of the Interborough Company based on the Nixon case.

There has been considerable litigation over the regulatory provisions of the Public Service Commissions Law. None of it, however, has had any relation to the Rapid Transit Act. It is upon what has been said in the opinions written in these cases that the Interborough Company has worked up its claim for immunity from the provisions of the contracts and the Rapid Transit Act.

These decisions related in some instances to gas cases, but for the most part, they have been concerned with the power of the Public Service Commission under Section 49 *supra* to change rates in street surface railway franchises where in consenting thereto a city has attached some conditions as to rates of fare to be charged.

The decisions involved will be discussed in their chronological sequence. They are as follows:

Matter of Quinby v. *Public Service Commission*, 223 N. Y. 244 (decided April 5, 1918);

Matter of International Railway Co. v. *Rann*, 224 N. Y. 83 (decided July 12, 1918);

People ex rel. Village of South Glens Falls v. *Public Service Commission*, 225 N. Y. 216 (decided January 7, 1919);

Matter of International Railway Co. v. *Public Service Commission*, 226 N. Y. 474 (decided July 15, 1919);

Matter of Quinby v. *Public Service Commission*, 227 N. Y. 601 (decided October 21, 1919);

Matter of City of Niagara Falls v. *Public Service Commission and International Railway Co.*, 229 N. Y. 333 (decided July 7, 1920);

People ex rel. City of New York v. *Nixon*, 229 N. Y. 356 (decided July 7, 1920);

People ex rel. Garrison v. *Nixon* (3 cases), 229 N. Y. 575 (decided July 7, 1920);

People ex rel. Garrison v. *Nixon* (3 cases), on re-argument, 229 N. Y. 645 (decided October 22, 1920);

Town of North Hempstead v. *Public Service Commission*, 231 N. Y. 447 (decided July 14, 1921);

City of New York v. *Brooklyn City R. R. Co.*, 232 N. Y. 463 (decided February 3, 1922) (This case involved other provisions of the Public Service Commissions Law).

In every decision made by the Court of Appeals of the State of New York involving the application of the Public Service Commissions Law, that Court has been careful to limit its action to the facts of the particular case being decided. It has expressly and repeatedly asserted that it decides the case before it and no other.

None of the decisions cited in the opinion of the statutory court relate to the Rapid Transit Act or any action taken thereunder.

In *Matter of Quinby, supra* (223 N. Y. 244), a street railway company applied to the Public Service Commission for an increase in fare from five cents to six cents. It was opposed on two grounds, the second being that in consenting to the grant of the franchise the local authorities of the City of Rochester had stipulated a condition for a five cent fare. The Court, after quoting from Section 181 of the Railroad Law and Section 49 of the Public Service Commissions Law, discussed the question of remedy and jurisdiction, and at page 259 said (italics ours):

> "We have still to consider whether jurisdiction is limited,
>
> 2. By the fact that the consent of the local authorities was given on condition as to rates of fare.
>
> The Constitution, article III, section 18, as it was amended in the year 1875, provides:
>
> > 'But no law shall authorize the construction or operation of a street railroad except upon the condition that the consent of the owners of one-half in value of the property bounded on, *and the consent also of the local authorities having the control of, that portion of a street or highway upon which it is proposed to construct or operate such railroad be first obtained*' * * *.
>
> The power of the local authorities to impose as a condition to giving consent to the construction and operation of a street railroad that a stipulated rate of fare should be charged has been repeatedly upheld."

After extended discussion, at page 263, the Court concluded:

> "*In the absence of clear and definite language conferring without ambiguity jurisdiction upon the*

public service commission to increase rates of fare agreed upon by the street railroad and the local authorities we should not unnecessarily hold that the legislature has intended to delegate any of its powers in the matter, whatever its powers may be. The Public Service Commissions Law (§26, §49, subdv. 1) and the Railroad Law (§181) deal with maximum rates of fare established *by statute* but make no reference in terms to rates established *by agreement* with local authorities.

"In regulating rates three courses were open to the legislature:

"1. To prescribe rates itself. 2. To delegate the power to the commission. 3. To leave the matter to agreement between the street railroad company and the local authorities. It has constitutionally conferred on the public service commission certain functions (*Matter of Trustees of Village of Saratoga Springs* v. *Saratoga Gas, E. L. & P. Co.*, 191 N. Y. 123), which plainly include the power to regualte rates fixed by statute, and while it may be said that it has undertaken to delegate to the public service commission *'the same power' that it has* to regulate rates of fare (Railroad Law, §181) *it is impossible to find a word in the statutes which discloses the legislative intent to deal with the matter of rates fixed by agreement with local authorities.* As it has often been held in connections other than that of legislative power over them that such agreements are valid, *it may well be inferred that the legislature excluded them from consideration by failure to mention them and that it has made no attempt to turn them over to the public service commission for revision.* 'Statutes should be read according to the natural and most obvious import of the language, without resorting to artificial or forced constructions, for the purpose of either limiting or extending their operation.' (*Mat-*

ter of N. Y. & Brooklyn Bridge, 72 N. Y. 527, 529; *Heerwagen* v. *Crosstown St. Ry. Co. of Buffalo*, 179 N. Y. 99.) 'A thing which is within the letter of the statute is not within the statute, unless it be within the intention of the makers.' (*Riggs* v. *Palmer*, 115 N. Y. 506, 509; *McDowall* v. *Sheehan*, 129 N. Y. 200, 206.) *The authority of the commission to regulate rates in such cases and thus to extinguish an undoubted power of the local authorities should fairly appear before it is assumed to exist.*

"It follows that the public service commission is without jurisdiction; that prohibition is the proper remedy; that the order appealed from should be reversed and that an absolute writ of prohibition be awarded to relators, with costs to appellants in all courts" (pp. 263-264).

In *People ex rel Village of South Glens Falls* v. *Public Service Commission, supra*, the village had granted a franchise in 1900 to a gas company to lay mains and feeders for gas purposes, for fifty years, and containing a provision that the rate charged for gas would not exceed $1.25 per thousand feet. The right of the Village to impose such a condition was founded, not upon the Constitution, but in the Transportation Corporations Law. The question presented was whether the Public Service Commission had power to regulate the price of gas under such circumstances. The court held, first, that the legislature had the right to regulate the rates, and, second, that it had conferred such power on the Public Service Commission.

In the *Matter of International Railway Co.* vs. *Public Service Commission*, 226 N. Y. 474, there was involved the rate of a street railway fixed in an agreement with the local authorities, of the city of Buffalo, which expressly consented

to subsequent revision and regulation. The application for the fixation of a new rate was made by the city itself.

At p. 479 the court says:

> "The situation, then, is this: *Municipality and railroad have joined in the declaration that the rate fixed by their agreement shall be, not final, but provisional.*"

How utterly unlike the case at bar, where the City and Interborough Company, pursuant to express legislative authority and the judgment of the Court of Appeals, rendered in a taxpayer's attempt to enjoin them, entered into agreements which provided:

> "The Lessee shall, *during the term of the contract*, be entitled to charge for a single fare upon the railroad and the existing railroads the sum of five (5) cents but not more."

The term of the contract was forty-years unless sooner terminated by recapture.

Matter of Quinby v. *Public Service Commission*, 227 N. Y. 601, was a motion for re-argument made eighteen months after the decision in the principal case. In denying the motion the court said:

> . . .; "Nothing decisive of this case was overlooked. Motion for re-argument herein *fails to produce any 'clear and definite language'* in the statutes which discloses the legislative intent to deal with the matter of rates so fixed by agreement with the local authorities."

Matter of Niagara Falls v. *Public Service Commission*, *supra* (decided on the same day as the *Nixon* and *Garrison* cases), was another case where it was sought to have the

Public Service Commission increase the rate of fare on a street railway in consenting to the franchise for which the common council had annexed a condition that the rate of fare be five cents.

At p. 338 the Court said:

> "In the instant case we are again asked to overrule our decision in the *Quinby* case. *Here, as in that case, the question of the power of the legislature to confer upon the public service commission authority to abrogate conditions embodied in the agreement between local authorities and a railroad company is not presented, for the legislature has not undertaken to confer such power but has consistently for three successive sessions since the decision in the Quinby case declined so to do.* We are now urged to hold that the legislature intended to delegate power to the public service commission to modify the rates prescribed in the contract between the local authorities and the railroad company, against the protest of the municipality, *notwithstanding the refusal of three successive legislative bodies to accede to such demand for delegation of power.* This we are not prepared to accede to."

People ex rel. City of New York v. *Nixon, supra* (decided on the same day as the *Niagara Falls* and *Garrison* cases), involved a street railway franchise granted by the City of New York, which in giving its consent had done so on the condition that the maximum rate of fare be five cents. The grant was made October 29, 1912.

This is the case most relied upon by the statutory court, and is the only one from which extended quotation from the opinion was made.

This franchise was granted under the general charter powers of the City. *It was not granted under the Rapid*

Transit Act; nor was the City of New York in any way interested in the undertaking, financially or otherwise.

We begin our quotation from the opinion where the statutory court left off. At page 359 the court said:

> "We held, however, in *Matter of Quinby* (223 N. Y. 244; 227 N. Y. 601, explained and limited in *People ex rel. South Glens Falls* v. *Public Service Comm., supra*), and again in *Matter of International Ry. Co.* v. *Public Service Comm.* (226 N. Y. 474), that the legislature did not intend to clothe the commission with the power to release the obligation of then existing contracts between railroads and municipalities when the contracts established rates as conditions of a franchise. We did not hold that there was any constitutional restraint upon the grant of such a power. Restraint under the Federal Constitution, there certainly was none (*City of Worcester* v. *Worcester Con. St. Ry. Co.*, 196 U. S. 539, 548; *Hunter* v. *City of Pittsburgh*, 207 U. S. 161, 178; *Union Dry Goods Co.* v. *Georgia Pub. Service Corp., supra; Postal-Tel. Cable Co.* v. *Associated Press, supra; City of Englewood* v. *Denver & So. P. Ry. Co.*, 248 U. S. 294; *New Orleans* v. *New Orleans Water Works Co.*, 142 U. S. 79; *People ex rel. Vil. of South Glens Falls* v. *P. S. Comm., supra*). We left open the question whether there was any under the Constitution of the state (Const. art. III, sec. 18; *Matter of Quinby, supra*, p. 463; *Matter of Int. Ry. Co., supra*, p. 482). Limiting our ruling strictly to the necessities of the case, we held that where the consent of the municipality had been granted upon conditions, an intent to permit the commission to impair the obligation of such conditions or of the contract which embodied them, was not to be imputed to the legislature as the result of doubtful inference (*Matter of Quinby, supra; Matter of Int. Ry. Co.*,

supra). On the other hand, we expressly conceded, as we had often before held, that there was plenary power in the legislature to determine the conditions that might be attached by municipalities to consents to be given in the future (*Matter of Quinby, supra*, at p. 261; *Matter of 34th St. R. R. Co.*, 102 N. Y. 343; *Beekman* v. *Third Ave. R. R. Co.*, 153 N. Y. 144, 152; *People ex rel. S. S. Traction Co.* v. *Willcox*, 196 N. Y. 212). It was the 'annulment' of a condition already imposed, the 'abrogation of a defeasance' already attached, the impairment of an obligation already created (*Matter of Int. Ry. Co., supra*), which we refused to bring within the jurisdiction of the commission through words of doubtful import.

A different problem confronts us here. Here the statute was in existence when the municipal consent was given. Recognition in such circumstances of the power of the commission *involves no interference with a grant already executed.* No condition is annulled; no defeasance is abrogated; no obligation of contract is nullified or impaired. The obligation of a contract is determined by the law in force when it is made (*McCracken* v. *Hayward*, 2 How. [U. S.] 608, 612). There are times when, in the exercise of the police power, an obligation, once attaching, may be modified or destroyed (*Louisville & Nash. R. R. Co.* v. *Mottley, supra; Union Dry Goods Co.* v. *Georgia Pub. Serv. Corp., supra; Producers' Transp. Co.* v. *R. R. Comm., supra*). That problem never arises when the power has been exerted before the contract has been made. Impairment is conceivable as the result of a statute passed thereafter. Impairment is inconceivable when, at the time of the contract, the statute is in force (*Lehigh Water Co.* v. *Easton*, 121 U. S. 388; *Denny* v. *Bennett*, 128 U. S. 489; *Oshkosh Water Works Co.* v. *Oshkosh*, 187 U. S. 437, 446). *Statutes then existing are read into the contract.

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* The part of the opinion between the asterisks is the basis of the Interborough's claim for regulation by implication under the Public Service Commissions Law. (Complaint XLIII; R. 52-53. See p. 4, supra.)

They enter by implication into its terms. They do not change the obligation. They make it what it is. The statute which clothed the commission with jurisdiction to increase charges if found to be inadequate, was notice to municipalities that franchises thereafter granted must be coupled with no conditions inconsistent with the jurisdiction thus conferred.* The commission is now holding the city to terms which were accepted by implication when the conditions were imposed. This is not to 'transform a consent that was qualified into one that is absolute' (*Matter of Int. Ry. Co., supra*, p. 482) as the result of retroactive legislation. This is merely to give effect to the settled rule that contracts are made in submission to existing legislation. Nothing in the *Quinby* case commits us to another doctrine. The contract there considered preceded by a score of years the promulgation of the statute which subjected rates and charges to revision by the commission if excessive or inadequate. The opinion must be read in the light of the facts before us (*Cohens* v. *Virginia*, 6 Wheat. 264, 399; *Colonial City Traction Co.* v. *Kingston City R. R. Co.*, 154 N. Y. 493), and in that of later opinions which explain and circumscribe its scope (*People ex rel. Vil. of South Glens Falls* v. *P. S. Comm., supra; Matter of Int. Ry. Co.* v. *P. S. Comm., supra*). We have held, in view of the constitutional provisions requiring the consent of municipalities to the construction and operation of railroads in their streets, that the statutes ought not to be interpreted as permitting the public service commission in such circumstances to nullify existing contracts. We are now asked to hold that the municipalities by their contracts may nullify existing statutes. We will not go so far (*State Public Utilities Comm.* v. *City of Quincy*, 290 Ill. 360; *Collingswood Sewerage*

Co. v. *Collingswood*, 91 N. J. L. 20; 92 *id.* 509; *Atl. Coast El. R. Co.* v. *Public Utility Comm.*, 92 N. J. L. 168; *Matter of Guilford Water Co.* [Me.], 108 Atl. Rep. 446; *Matter of Searsport Water Co.* [Me.], 108 Atl. Rep. 452; *Milwaukee El. R. & L. Co.* v. *R. R. Comm.*, 153 Wis. 592). **In thus holding, it may be prudent, even though unnecessary, to say that we decide the case before us, and no other. The conditions of other franchises may supply elements of distinction which cannot be foreseen. Contracts made after the passage of the statute (Consol. Laws, ch. 48) may conceivably be so related to earlier contracts either by words of reference or otherwise as to be subject to the same restrictions. We express no opinion upon these and like questions. They are mentioned only to exclude them from the scope of our decision. In deciding this case, we put our ruling upon the single ground that the franchise contract of October, 1912, was subject to the statute, and by the statute may be now changed."**

This opinion is not an authority for subverting the great city purpose of the City of New York to provide rapid transit facilities for the distribution of population and contract for their operation under the Rapid Transit Act.

The first sentence following the part quoted by the statutory court, expressly re-affirms that in the ***Quinby*** case it was held that the Legislature "did not intend to clothe the commission with power to release the obligation of then existing contracts" in cases protected merely by a constitutional consent. Contracts #1 and #2 were not only existing obligations when the Public Service Commissions Law was passed and amended, but they were each executed pursuant to express statutory authority, to achieve a great city purpose by a huge public investment and a constitutional sanction. In fact both the making of such contracts and the

inclusion therein of rate provisions were expressly required by the Legislature (Laws of 1894, secs. 13, 14 and 34, *supra*, pp. 8-10).

"Here the statute was in existence when the municipal consent was given" (page 360). The Rapid Transit Act was not only in existence when contracts Nos. 1, 2 and 3 were made, but it was amended in 1912 specifically to sanction contract #3, the terms of which were undoubtedly before the Legislature at the time. (*Admiral Realty Company* v. *City of New York*, 206 N. Y. 110, 124.)

> "Statutes then existing are read into the contract. They enter by implication into its terms" (p. 361).

Contract #3 does not leave it to implication. It expressly provides:

> "Article III. This contract is made pursuant to the Rapid Transit Act which is deemed to be a part hereof as if incorporated herein."

Quoting again from the opinion:

> "The statute which clothed the commission with jurisdiction to increase charges if found to be inadequate was notice to municipalities that franchises thereafter granted must be coupled with no conditions inconsistent with the jurisdiction thus conferred."

Contract #3 is not a franchise. Under it the contractor acquires no right, privilege or license in or to the city's streets or any part thereof. It is a contract for equipment, maintenance and operation of a road and equipment wholly

owned by the City of New York. The operator is employed to discharge the duties of operation.

(*People ex rel. Interborough Rapid Transit Company* v. *Tax Commissioners, supra*, pp. 65-66.)

The Rapid Transit Act, which alone gave the public service commission power to act (in its capacity as the successor of the board of rapid transit railroad commissioners) in the preparation and execution of contract #3, conferred such power, and it could be exercised only, "subject to the approval of the board of estimate and apportionment".

Whatever terms and conditions as to rates of fare and character of service the commission deemed best suited to the public interests and whatever supervision, conditions, regulations and requirements were determined upon by the commission *had to be determined upon prior to the execution of the contract* and were subject to "like approval" of the board of estimate and apportionment. (Sec. 27, subd. 3, as amended by the Wagner bill, Laws of 1912, ch. 226.)

> "The commission is now holding the city to terms which were accepted by implication when the conditions were imposed." (Opinion, *Nixon* case, p. 361.)

In the *Nixon* case, the commission had nothing to do with the preparation or execution of the franchise, which had been granted by the board of estimate under the general charter powers of the city, wholly separate and apart from the Rapid Transit Act.

But in the case at bar, *the commission itself prepared the contract and it also prepared and procured the introduction of the Wagner bill to obtain express legislative sanction for novel features of the contract* (R., 565). "Every such contract *shall contain such terms and conditions as to the rates of fare*", &c.

The commission was the very same commission that according to the court below would afterwards change such terms as it saw fit, wholly freed from any necessity for approval by the board of estimate and apportionment.

That such an idea was foreign to the commission appears from the brief submitted by the commission in *Admiral Realty Co.* v. *City of New York, supra,* in support of the validity of the contract containing the provision for a five cent fare for forty-nine years, subject to earlier termination, not then executed, but held in abeyance by a taxpayer's action, brought at the instance of the Interborough Company. In that brief, at page 24, it was argued:

> "A great city like New York can inaugurate such an improvement *for its purposes are not those of money making but are based upon and dictated by present and future necessities.* Private capital, however, looks at the matter from the standpoint of hard headed business. It could never see its way clear to embark upon such a stupendous expansion and face the certain deficits of the earlier years of operation when the readjustment was taking place. *It could perhaps on one condition—if it could increase the fares.* But the people of the City are so thoroughly wedded to the five cent fare system that a change in that respect is impossible. With the unparalleled expansion on the one hand and the retention of the five cent fare on the other *it became necessary for the City to assume any risk that may be incident to its own transit program.*"

The "holding the city to terms," would take place before the Public Service Commission and, according to the notion now advanced by the Interborough Company, the very body (possibly the same persons) that in one capacity (under the Rapid Transit Act) negotiated the contract,

procured the approval thereof by the Board of Estimate and Apportionment, and thereafter executed it in the name of the City of New York, would be required in another capacity (under the Public Service Commissions Law) to pass upon the reasonableness of their own acts and those of the Board of Estimate and Apportionment, in the making and execution of the contract; and thereafter, if the Interborough Company had not obtained enough to satisfy its desires, on a claim of confiscation, it might be tried all over again in a Federal court. What then becomes of the powers the City of New York built up during forty years' effort to attain the great city purpose of distribution of population and even development of all of its boroughs by adequate transit facilities? What becomes of the unlimited use of public money, sanctioned by the Legislature and the Constitution, predicated at every step on the concept of contract? What becomes of the contracts? Are they wholly nullified or are only such provisions nullified as are objectionable to the contractor, leaving the City bound by the others?

What becomes of the City's power to approve routes and use public funds for the construction or equipment or both of rapid transit roads to be operated by contract?

Is the operator the master or the servant of the City?

Is there anything left of the Rapid Transit Act except municipal construction, equipment and operation? Concededly such lines under direct municipal operation are not subject to regulation by the Transit Commission as to rates and service.

> "Nothing in the *Quinby* case commits us to another doctrine. . . . *We have held,* in view of the constitutional provisions requiring the consent of municipalities to the construction and operation of railroads in their streets, *that the statutes ought not*

> ***to be interpreted as permitting the public service commission in such circumstances to nullify existing contracts''*** **(page 362).**

Contracts #1 and #2 were "existing contracts" in 1913. They referred to the "Existing Railroads" (Contract No. 3, Art. II, par. 11). The very first Article in contract #3 expressed the determination of the parties that contracts #1 and #2 were to remain in full force and effect, except in certain specified particulars, none of which effected a change in the rate of fare.

> "The City and the lessee further agree upon the modification of Contract No. 1 and Contract No. 2 in the respects herein set forth, *but nothing in this contract* shall be construed as a modification or waiver of any of the rights or obligations of the respective parties under Contract No. 1 and Contract No. 2, *except in the respect and to the extent herein specifically set forth*" (Art. I).

The statutory court, however, sought to bridge this difficulty by saying that "Contract #3 was a modification and a waiver of fare provisions of contracts #1 and #2".

This not only does violence to the language of the contracts, but it overlooks the severance of the "railroads" and the "existing railroads" upon recapture of the former by the City; which can happen in 1929 or at any time thereafter. Unless such "modification and waiver" were also severed, the 17.1% return on the "existing railroads" (*infra*, p. 47) would then be subject to severe regulation, resulting perhaps in a three (3) cent fare on the old lines.

Under municipal operation the recaptured lines would be operated so as to furnish service at cost (Rapid Transit Act, Sec. 30).

The expiration date of the term of the lease under Contract #1 was moved forward from October 27, 1954, to December 31, 1967; and of the lease under Contract #2 from May 1, 1943, to the same date (Article XLVIII).

So long as there was no recapture by the City the Interborough agreed to pay a small item of additional rent, out of earnings (*ib*).

The period for which the Interborough could charge a fare of five (5) cents was automatically extended with the leases. The rate of fare was not changed. *No provision was made to change it in cases of recapture.*

The Lessee agreed to modify the leases in case of recapture, by an exchange of legs. Rental was then to be readjusted by agreement or arbitration; *but there was no provision for modification in the rate of fare on the non-recapturable lines* (Articles LXXXI, LXXXII).

"The Lessee shall during the term of the contract be entitled to charge for a single fare upon the Railroad and the Existing Railroads the sum of five (5) cents but not more" (Article LXII).

Statutory Court concedes Contracts Nos. 1 and 2 inviolable unless controlled by Contract No. 3, executed after passage of Public Service Commissions Law.

The entire force of the opinion of the statutory court is lost unless there was such a "modification and waiver" notwithstanding the provisions of the contract to the contrary; for the Court found it necessary to say (R. 1979):

> "If the plaintiff's right to charge a fare in excess of five (5) cents—assuming that rate to be confiscatory—were to be determined solely upon the provisions of contracts #1 and #2, which were made pursuant to specific authority granted by the State legislature to the Board of Rapid Transit Commis-

> sioners to contract for a five (5) cent fare, and were such determination to be unaffected by the enactment of the Public Service Commissions Law in 1907, and the execution of contract #3, *the plaintiff would not now be entitled to judicial relief*".

In saying this the statutory court gave no effect to that part of the *Nixon* opinion which limited the Court's decision to the precise case before it.

> "In thus holding, it may be prudent, even though unnecessary, to say that we decide the case before us, and no other. The conditions of other franchises may supply elements of distinction which cannot be foreseen. Contracts made after the passage of the statute (Consol. Laws, ch. 48) *may conceivably be so related to earlier contracts either by words of reference or otherwise as to be subject to the same restrictions*" (p. 362).

It would be impossible to conceive of contracts more closely related than Nos. 1, 2 and #3. According to the statutory court, it would have been impossible to make contract #3 without annulling or terminating the fare provisions in #1 and #2. Yet, the parties expressly agreed to extend the term of contract #1 for thirteen years and of #2 for 24½ years.

The "implication" and power of regulation claimed by the Interborough Company on the basis of the *Nixon* case was held squarely against such claim in the *Garrison* cases and on motion for reargument thereof.

In the Garrison cases the Court held that franchises granted on April 3, 1916, nine years after the Public Service Commission's law took effect, which expressly modified fare provisions in franchises granted before the enactment of such law, did not have the effect of subjecting such earlier or later contracts to the regulatory provisions of such law.

In *People ex rel. Garrison* v. *Nixon* (3 cases), 229 N. Y. 575 (decided on the same day as the *Niagara Falls* and *Nixon* cases), the Court of Appeals affirmed orders dismissing writs of certiorari and affirming proceedings of the Public Service Commission denying applications by the relators, for permission to increase the rate of fare on street surface railways.

At page 576 the Court says:

> "*Per Curiam.* The petitions of the appellants to the public service commission requested an order authorizing the appellant to charge and collect a cash rate of fare of eight cents for the transportation of passengers 'between any two points of any of said lines of railroad' of the company. We construe this as an application for an increase of fare on the entire route and so the record shows that it was construed by counsel.
>
> We think that the following classes of franchises fall outside the scope of our decisions in *Matter of Application of the City of Niagara Falls* v. *Public Service Commission of the State of New York for the Second District and the International Railway Company* (decided herewith) (229 N. Y. 333); *Matter of Quinby* v. *Public Service Commission* (223 N. Y. 244):
>
> 1. All franchises granted directly by the legislature.
>
> 2. All franchises granted by a municipal authorities prior to January 1, 1875. Such franchises are subject to proper legislative regulation.
>
> 3. ***All franchises granted by municipal authorities subsequent to the passage of the Public Service Commissions Law on July 1, 1907.***

4. The following franchises granted between January 1, 1875, and July 1, 1907:

a. The franchise granted in and by the consent of the common council of the city of Brooklyn to the Atlantic Avenue Railroad Company, dated March 13, 1882 (now a part of the Nassau Electric Railroad Company).

b. The franchise granted in and by the consent of the common council of the city of Brooklyn to the Prospect Park and Coney Island Railroad dated December 21, 1885, consenting to the construction of a line on Park avenue and other streets in Brooklyn.

c. The franchise granted in and by the consent of the common council of the city of Brooklyn to the Nassau Electric Railroad Company, dated June 19, 1893, covering a number of lines as therein stated.

The orders, therefore, should be affirmed without prejudice to the right of the relator to make separate applications as to the franchises which come within the jurisdiction of the public service commission as herein indicated."

The reargument in the Garrison cases.

When the decisions in the *Garrison* cases were rendered, and it appeared from the opinion that the Court had excepted from the scope of its decision in the prior cases cited:

> "3. All franchises granted by municipal authorities subsequent to the passage of the Public Service Commissions Law on July 1, 1907."

the appellants in those *Garrison* cases immediately sought to take advantage of such exception by a motion for a reargument, *in which they pressed upon the Court the fact that certain of their franchises were granted subsequent*

to such date, namely, on April 3, 1916, and that as such franchise modified pre-existing franchises, the effect was to supersede their fare provisions and open up the entire subject of fares to regulation by the Public Service Commission.

In their **briefs in support of motions for reargument** the appellants in those cases urged the following:

> "In the opinion in the instant case, this Court held that all franchises granted by municipal authorities subsequent to the passage of the Public Service Commissions Law on July 1, 1907, fell outside of the scope of the decision in the Quinby case and the Niagara Falls case.
>
> • • • • • •
>
> **"The franchise contract of the Nassau Company which now controls the rate of fare upon all its lines was made on April 3, 1916, and therefore under the opinion of the Court in the instant case, the Court should have reversed the order of the Public Service Commission appealed from.**
>
> *Under date of April 3, 1916,* The Nassau Electric Railroad Company entered into a franchise contract with the City of New York (see Exhibit X, p. 99) pursuant to a resolution adopted by the Board of Estimate on August 26, 1915, granting a franchise on Eighth Avenue. *This new franchise superseded and modified all previous agreements with the local authorities with respect to the rate of fare of any and all the railroads operated by The Nassau Electric Railroad Company.*
>
> This contract of April 3, 1916, provides as follows:
>
> 'Sec. 2. The grant of this privilege is subject to the following conditions which shall be complied with by the Company.

'Thirteenth: The rate of fare for any passenger upon said railway shall not exceed five (5) cents. The Company shall not charge any passenger more than five (5) cents for one continuous ride *from any point on its road or on any road, line or branch, operated by it or under its control to any other point thereof, or any connecting branch thereof,* WITHIN THE LIMITS OF THE CITY, unless a rate of fare in excess of five (5) cents may be lawfully charged therefor.

'The Company shall carry free upon the railway hereby authorized during the term of this contract all members of the Police and Fire Departments of the City when such employees are in full uniform.'

'Sec. 3. Nothing in this contract shall be construed as in any way limiting the present or future jurisdiction of the Public Service Commission under the laws of the State of New York.'

At the time the above contract was made there were in existence a number of franchise contracts affecting rates of fare upon various portions of the Nassau Company's railroad system. • • •

• • • • • •

By the contract of April 3, 1916, the obligation of the Nassau Company, which then owned, controlled and operated many routes and lines besides those referred to in the consent of 1860, was changed and it thereby assumed a new contract obligation, and thereby agreed to carry passengers for a five cent fare not only over those routes but between any point on those routes and any point on any other route or line operated by it anywhere within the city. Furthermore, the provision in the contract of 1860 that "all persons attending school shall not be charged a fare exceeding three cents" was abrogated by the new contract of 1916, which makes no

distinction between passengers attending school and others.

The only exception to the sweeping character of the new contract which the Nassau Company entered into on April 3, 1916, was that if it should be lawfully permitted to charge in excess of five cents over any of its lines it could do so. As we hereafter point out, this clause was inserted for the reason, among others, of saving to the company the right given it by statute to charge ten cents to Coney Island. This clause had no bearing upon the character of the franchise of April 3, 1916, as a superseding franchise.

* * * * * *

By the contract of April 3, 1916, referred to above, the City of New York (as successor of all the above mentioned local authorities) and the Nassau Electric Railroad Company (as successor of all the above Companies) made a new agreement with respect to fares. In addition to owning lines upon which the rate of fare was fixed by existing franchises, the Nassau Company then owned and operated many lines and routes upon which the rate of fare was not fixed or restricted by any contract with local authorities. The new contract, however, fixed the rate of fare upon the entire railroad system operated by it at five cents (except where a higher rate of fare could be "lawfully" charged). Whereas, by the terms of the above mentioned franchises of 1892, 1893 and 1894 (the obligations of which the Nassau Company had assumed by merger of the Companies obtaining such franchises) it was obligated to carry passengers for a single fare or a five cent fare over *only limited portions* of its railroad, and whereas under certain franchises there was *no* contract *limit* on the rate of fare chargeable, the Nassau Company, by the new contract of 1916, obligated itself to carry passengers between any point on the lines formerly of the

merged railroads and any other point on its entire system of railroads for a five cent fare. The contract of 1916 clearly was a new contract covering the entire subject of rate of fare on all its lines. It was a different contract from those which previously had been made between the companies and the various local authorities and was clearly intended to supersede all such contracts.

• • • • • •

Not only did the franchise of April 3, 1916, supersede all prior franchises of the Nassau Company with respect to the rate of fare therein established, but in said franchise the City of New York and the Company inserted an express provision for jurisdiction by the Public Service Commission over the terms of the franchise. Section 3 of Article Thirteenth of the franchise which we have quoted above was to the effect that:

> "Sec. 3. Nothing in this contract shall be construed as in any way limiting the present or future jurisdiction of the Public Service Commission under the laws of the State of New York."

In other words, by this franchise of April 3, 1916, the City and the Company rebargained as to the rate of fare over the entire system of the Nassau Company and then expressly subjected the franchise to the jurisdiction of the Public Service Commission.

Except for legislative restrictions, the Nassau Company, previous to the contract of 1916, could have charged additional fares and a higher rate of fare than five cents on all portions of its railroad system except those portions where fare provisions in previous contracts had limited the rate of fare. By the contract of 1916 it assumed an entirely new and enlarged contract obligation with the local authority, which superseded all previous contracts upon the subject. This is the existing contract between

the City and the Company covering the subject of rate of fare upon the Company's entire system and, having been made since the enactment of the Public Service Commission's Law and made expressly subject to the powers of the Commission, *under the rules laid down by the Court in its opinion in the instant case*, the Public Service Commission clearly has jurisdiction to increase the rate of fare upon the lines of railroad operated under the franchise.

It will thus be seen that all of the franchises of the Nassau Company come within the classes of cases enumerated by the Court in the instant case as falling outside of its opinion in the *Quinby* case and in the *Niagara Falls* case.

The decision of the Appellate Division in the *Nassau Company* case should, therefore, be reversed and the proceeding remanded to the Public Service Commission for action upon the merits.

* * * * * *

The franchise contract of the Brooklyn, Queens County and Suburban Railroad Company which now controls the rate of fare upon all its lines was made on April 3, 1916, and therefore under the opinion of the Court in the instant case, the Court should have reversed the order of the Public Service Commission appealed from.

Under date of April 3, 1916, the Brooklyn, Queens County & Suburban Railroad Company entered into a franchise contract with the City of New York (see Exhibit X, p. 71, *et seq.*), pursuant to the resolutions adopted by the Board of Estimate on August 26, 1915, granting a franchise on Metropolitan Avenue. This new franchise superseded and modified all previous agreements with local authorities with respect to the rate of fare upon any and all of the rail-

roads operated by the Brooklyn, Queens County & Suburban Railroad Company.

* * * * * *

By the contract of April 3, 1916, the obligation of the Brooklyn, Queens County and Suburban Railroad Company, which then owned, controlled and operated many routes and lines besides those formerly of the Metropolitan Railroad Company and the Broadway Railroad Company, was changed and it thereby assumed a new contract obligation and thereby agreed to carry passengers for a five cent fare not only over the routes acquired by the merger of those Companies, but between any point on those routes and any point on any other route or line operated by it, unless the Company should have a lawful right (as distinguished from a contract right) to charge a greater rate of fare. The contract of 1916 clearly was a new contract covering the entire subject of rate of fare on all lines of the Brooklyn, Queens County and Suburban Railroad Company It was a different contract from those which previously had been made between the merged Companies and the various local authorities and was clearly intended to supersede all such contracts.

All that has been said hereinabove in this brief with respect to the legal effect of the acceptance by the Nassau Company of the superseding franchise of April 3, 1916, applies with respect to this franchise granted on the same date to the Brooklyn, Queens County & Suburban Railroad Company, and it therefore need not be repeated under this point. They were substantially identical in terms, including the provision as to the jurisdiction of the Public Service Commission.

It therefore appears that all of the franchises of the Brooklyn, Queens County & Suburban Railroad Company fall within the classes of cases which this

Court in the instant case has said are outside of the scope of its decision in the Niagara Falls and Quinby cases.

Therefore the decision of the Appellate Division in Brooklyn, Queens County & Suburban Railroad Company case should be reversed and the proceeding remanded to the Public Service Commission for action upon the merits."

Subsequently, the motion for reargument of the *Garrison* case was denied (229 N. Y. 645).

At page 645, the Court says:

"*Per Curiam.* The motion by the appellant for a re-argument of the appeal in each of the above entitled proceedings should be denied.

First. It is urged that we should have held that the franchises granted to the Nassau Company and the Brooklyn, Queens County and Suburban Company respectively, on April 3, 1916, *were new contracts modifying and superseding all previous agreements* with local authorities in respect of the rate of fare upon any and all of the railroads entering into such systems respectively, *and that these new franchises having been granted subsequent to July 1, 1907, were beyond the application of our decision in Matter of Quinby* v. *Public Service Commission* (223 N. Y. 244), *and were subject to the jurisdiction of the public service commission. This proposition was fully considered on the original argument, and we reached the conclusion, which we have no disposition to change, that under all of the circumstances attending the granting of said franchises and including the saving clause in respect of fares on constituent roads therein contained, said franchises did not have the effect of superseding and so abrogating franchises and contracts regulating fares on constituent roads*

as to become franchises or contracts beyond the scope of the Quinby case within the principles of the case of People ex rel. City of New York v. *Nixon* (229 N. Y. 356)."

When the facts are understood, the Garrison case, instead of justifying the action of the Statutory Court, is a conclusive authority against it.

In the *Garrison* cases the Court was dealing with ordinary street railway franchises granted under the general charter powers of the City of New York, in relation to properties in which the City had no investment or pecuniary interest of any kind whatsoever. The Court was not dealing with the contract rights of the City of New York in relation to its own property constructed under specific provisions of the Rapid Transit Act, a special law relating to that particular subject.

Moreover, in the *Nixon* case, relied upon by the Statutory Court, the Court was dealing with a franchise wholly unrelated to and unconnected with any prior franchise, contract or grant. The facts in the case are wholly dissimilar from those in the case at bar.

The subsequent decision of the Court of Appeals on the motion for reargument in the *Garrison* cases clearly shows that the *Nixon* case has no bearing whatever upon the case at bar, and that there is no substance to the claim that contract No. 3 superseded the fare provisions in contracts Nos. 1 and 2.

The conduct of the Interborough "in the presence of" the Nixon case, is utterly irreconcilable with the contentions now made by the Interborough respecting it.

In *People ex rel. City of New York* v. *Nixon*, Interborough Rapid Transit Company was among those who "requested permission and were allowed to submit briefs".

People ex rel. City of New York v. *Nixon*, 109 Misc. 7, 8; 190 App. Div. 612, 613.

The *Nixon* case was argued in the Court of Appeals on May 3, 1920 (229 N. Y. 356); on which day also the three *Garrison* cases were argued (229 N. Y. 575). On the argument of the latter, the Interborough interests were represented by Alfred A. Cook for trustee of Interborough Consolidated Corporation, *amicus curiae*.

The Interborough's application for an increased fare under contracts Nos. 1, 2 and 3, was made to the Public Service Commission on May 28, 1920, and was on the same date denied as follows:

> "And the Commission after hearing James L. Quackenbush, Esq., counsel for the petitioner, and Russel B. Burnside, Esq., Assistant Counsel for the Commission, being of the opinion that it is without jurisdiction in the premises to determine or fix a rate of fare different from the five cent rate fixed by Contract No. 3, it is
>
> Ordered, That said complaint be dismissed and said petition of Interborough Rapid Transit Company be and the same hereby is denied *for want of jurisdiction to determine and fix a rate of fare different from that fixed by Contract* No. 3 referred to in said complaint" (*R.* 1024).

On the next day, May 29, 1920 (*R.* 1071), the Interborough Company sued out a writ of certiorari to review the action of the Public Service Commission in denying its application for increased fares, because the contract deprived it of jurisdiction.

The decisions in the *Nixon* and *Garrison* cases, as well as in the *Niagara Falls* case, were each announced by the Court of Appeals on July 7, 1920 (229 N. Y. 333, 356, 575).

On September 20, 1920 (*R.* 1074), the Interborough Company in the certiorari proceeding served a printed brief of 101 pages (*R.* 1073) in which it maintained that

> "the Public Service Commission is authorized by statute to *regulate* the rate of fare" (*R.* 1073).

It procured a preference for its argument in the Appellate Division for November, 1920 (*R.* 1071).

On October 22, 1920, the Court of Appeals rendered its decision denying the re-argument in the *Garrison* cases.

Thereupon the Interborough adjourned its certiorari argument from November to December, and subsequently *it abandoned and discontinued the certiorari proceeding* (*R.* 1071) *without argument.*

The Interborough's contention that the *Nixon* case settled the law in its favor is discredited by the abandonment and discontinuance of its writ of certiorari without argument.

On March 22, 1922, the Interborough made a second application to the Public Service Commission, which covered the elevated railroads as well as the City owned subways; and which was denied "for lack of jurisdiction" on March 28, 1922. (*R.* 1024-1025).

The Interborough Company made no attempt to review such denial by certiorari or otherwise.

Recognizing that it was not entitled to any judicial relief, the Interborough, after waiting three years, made its next application to the State Legislature, by memorial or petition, where relief was refused. (*R.* 1197-1205).

In *Town of North Hempstead* v. *Public Service Commission*, 231 N. Y. 447, there was involved the franchise of a gas company consented to by the town at a date subsequent to the enactment of the Public Service Commissions Law.

In the case of gas companies, the State Constitution contains no provision requiring the consent of local authorities. The consent required in such cases is statutory, under the Transportation Law (*supra*, p. 143).

The court held that the statute was to be considered part of the franchise.

It is very manifest that there is nothing in any of the foregoing decisions that in any wise relates to the Rapid Transit Act or contracts thereunder involving the operation of roads built at public expense. Insofar as principles are concerned the Garrison cases, the latest expression of the Court of Appeals, is altogether against the Interborough claims and wholly sustains the City of New York.

POINT VII.

There is no confiscation of public property.

On the indisputable facts as to the property of the plaintiff involved herein, there is not even a plausible claim of confiscation of private property.

[THIS POINT IS PRESENTED WITHOUT IN ANY WISE WAIVING THE CONTENTION OF THIS DEFENDANT, THAT ALL CONSIDERATION OF CONFISCATION IS BARRED BY THE EXISTENCE OF LAWFUL CONTRACTS. THE FACTS ARE PRESENTED, HOWEVER, FOR THE INFORMATION OF THE COURT IN ORDER THAT IT MAY SEE THE INEQUITY OF THE PLAINTIFF'S CLAIMS.]

The plaintiff's claim for confiscation proceeds upon the assumption that it is entitled to 8% return on all of the *property owned by the City of New York* and its own investment in the properties used for rapid transit purposes, *and the increase in the value of such properties* resulting from increased costs, or the cost of reproduction thereof, less depreciation.

The property owned by the City of New York, *constituting a part of its streets*, is not the subject of confiscation.

It is elementary that confiscation relates to *private* property and not to *public* property.

The Rapid Transit Act provides:

> "§57. *Property deemed acquired for public use.* —All property acquired under the provisions of this act shall be and shall be deemed to have been acquired for public uses and purposes, and for the purpose of affording increased facilities for rapid transit between points within the city acquiring such

property. [*Former §60, as added by L. 1894, ch. 752, §9, and amended by L. 1909, ch. 498, §19, and renumbered by L. 1915, ch. 604.*]"

So far as the City of New York is concerned, its subways could be operated free of charges as are its bridges; or it could make such charges as it sees fit and support its subways, partly from such charges and partly from taxation.

Tolls on vehicles on all four East River bridges were abolished July 18, 1911, under an ordinance adopted by Board of Aldermen on the same date.

By Chap. 332 of the Laws of 1891 the trustees of the New York and Brooklyn bridge were authorized to make the footpath across the bridge free to pedestrians, and to cease the exaction of tolls thereupon.

Likewise the City of New York operates numerous ferries, such as those between Staten Island and Manhattan and Brooklyn, supported partly by tolls and partly by taxation.

This principle is illustrated in *Walla Walla* v. *Walla Walla Water Co.*, 172 U. S. 1:

> "The city might fix such prices as it chose for its water, and might even furnish it free of charge to its citizens, and raise the funds for maintaining the works by a general tax. It would be under no obligation to conduct them for a profit, * * *" (p. 11).

Interborough Company has no property in subways and no interest in the cost of reproduction thereof.

The plaintiff has no property in the subways, save only the equipment furnished under Contracts Nos. 1 and 2. *Even such equipmnet was paid for by the City of New York, as presently will appear.*

The plaintiff is not affected by any increase in the cost of reproduction of the City's property under Contracts Nos. 1 and 2; nor will it be interested in any decrease in the value thereof.

So far as Contract #3 is concerned, *the plaintiff has no interest whatever in any of the property*, whether provided by construction or for equipment. It is, therefore, not interested in the rise or fall of the cost of reproduction of such property.

One of the underlying and permeating fallacies of the plaintiff's position is, that it can reap some advantage from the changes in the value of the property owned by the City of New York, as measured by the original cost of construction and equipment, and the present cost of the reproduction thereof less depreciation.

The absurdity of the Interborough's claim is illustrated by the fact that, according to it, every time the City at its own expense makes an improvement in its facilities, *the Interborough would be entitled to 8% per annum on the cost, even though such improvement reduced the Interborough's cost of operation and increased its profits.*

It is wholly immaterial to the Interborough Company whether the value of the City's property increases or diminishes. It has no recourse against anything but revenues. From revenues it is entitled to the stipulated rate of interest upon its investment (tax exempt) and the repayment in annual installments of the principal thereof and profit thereon.

It is to be remembered that Contract #1 expressly provided that the sums the City should pay the contractor for the construction of the railroad *were to compensate the contractor for the provision of equipment.* It is expressed thus:

> "The said sums so to be paid do not include the cost of Equipment, *but do include a consideration satisfactory to the Contractor for its obligation to provide the Equipment which, when provided, shall be the property of the Contractor, subject to the first lien of the City, as provided in Chapter I of this contract*" (Contract No. 1, p. 18).

Contract #2 contains precisely the same provision as Contract #1 in relation to the equipment to be furnished in connection with the lines constructed under Contract #2. (Contract #2, p. 22.)

It is quite manifest from these provisions that the contractor's bid in each instance *included a sum to be paid by the City sufficient for the purpose of providing equipment.* The invitation to bidders in Contract #1, p. 132, expressly points out that:

> "The price stated for construction shall include the furnishing of all materials and the performance of all labor requisite to the complete construction *and equipment of the proposed Rapid Transit Railroad*, including all sewer and street construction, and reconstruction of other work caused by or incidental to the construction of the Railway, as set out in the proposed form of contract and specifications. The equipment when completely delivered shall, however, be the property of the Contractor, but subject to a lien of the City to secure performance by the Contractor of its obligations under the contract, including payment of rental under lease during its entire term."

The invitation to contractors, upon which bids were received for Contract #2, contains precisely the same provision (p. 116).

Under Contract #3 the Interborough Rapid Transit Company, the plaintiff, *advanced moneys* for certain specified purposes *and stipulated for the repayment of such moneys*, principal and interest annually, *from the revenues derived from operation.* It undertook to furnish and install the equipment provided by such moneys. *The title to such equipment vested in the City of New York upon delivery.*

> "The Lessee shall, at its own expense, provide a complete equipment of the Railroad, and when and as provided or delivered on the Railroad and accepted by the Commission, *the title to the equipment shall immediately and without further assignment vest in the City.*" (Art. XXXVIII.)
>
> "As one of the considerations moving to the City and upon the faith of which it makes this contract, the Lessee agrees to contribute toward the cost of construction of the Railroad." (Art. IX.)

Under Contract No. 3 the Interborough Company pays no rental.

While the Interborough Company *has a charge upon the revenues*, in the manner provided in Article XLIX of Contract #3, as hereinafter explained, *it has no interest in ownership of or lien upon any of the property by which such revenues are produced*, all of which belongs to the City of New York. All of the property owned by the City of New York must, therefore, be excluded from consideration on the question of confiscation.

The exclusion of the City-owned rapid transit lines from the claim of confiscation, leaves only the privately owned but contract operated Elevated Railroads, considered *infra* at p. 169.

The Interborough is Being Paid in Full According to the Terms of the Contracts and Its Return on Actual Investment Under Contracts Numbers 1, 2 and 3, in Excess of 8.3 Per Cent. Per Annum.

The total amount of the Interborough's investment under contract #3 is $120,000,000 in round figures (R. 852).

On $80,000,000 of this it receives under the contract six (6) per cent. or $4,800,000 per year.

On $40,000,000 in excess of $80,000,000, it receives one (1) per cent. per annum, plus the actual rate of interest paid by it, which, while not definitely shown in the record, is approximately six (6) per cent.

So that the total return to it on this is at the rate of seven (7) per cent., or $2,800,000.

To this must be added its preferential of $6,335,000, (which it gets because it insisted that there should be no diminution of the net earnings of that sum per year under contracts #1 and #2); making a total of $13,935,000.

Its claimed investment under contracts #1 and #2 is $48,000,000. This, added to the investment of $120,000,000, under contract #3, amounts to $168,000,000.

The annual return of $13,935,000 now being received by the Interborough (and which has heretofore been paid in full) is approximately 8.3% on $168,000,000. If the claimed investment of $48,000,000 under contracts numbers 1 and 2 be reduced by $11,000,000, which is obviously an improper charge against it, it would reduce the total investment to $157,000,000; on which the annual return of $13,935,000 is 8.87%.

Even if there were deducted from the current yield, a sum sufficient to completely amortize, extinguish and return to the Interborough the principal of its investment under

contracts numbers 1, 2 and 3, it would diminish the annual return by not more than .5887%, leaving the annual return somewhat in excess of 8.28⅛% (R. 657).

Compound Interest and Annuity Tables, Kent, p. 150.

The reason we say "by not more than" is because the rate .5887% is calculated upon *annual* accumulations of interest; whereas by the quarterly deductions allowed the Interborough, there are *quarterly* accumulations of interest. In such a case the annual sum, compounded quarterly at 4½%, required to amortize each one dollar of principal in 49 years, is .56536% (Kent, *supra,* p. 145); on which basis the annual return to the Interborough is 8.30½%.

Profit on return of principal and overpayments of interest.

A quarterly payment of $1., invested at 4½%, with interest accumulations quarterly at the same rate, at the end of 49 years will amount to $707.49. Taking the principal sum to be returned to the Interborough as $120,000,000 in round figures, 1% per annum which it deducts quarterly from revenues to repay its advances (*supra,* pp. 42, 52) would be $1,200,000 yearly or $300,000 quarterly, which multiplied by $707.49 shows that there would actually be returned to it during the life of the lease $212,247,270, of which $92,247,270 is sheer profit over and above its investment of $120,000,000.

Compound Interest Annuity and Sinking Fund Tables [Archer] *Edition of 1915, p. 64.*

Besides the foregoing, interest is received quarter annually on the whole of such principal sum of $120,879,749,

for the entire period of 49 years, although the principal is annually reduced by the one per cent. payments.

Leaving out of view the quarter annual feature and assuming, for simplicity, the payments of interest, as well as of principal, to be made annually, the effect of this part of the agreement is an overpayment of interest each year after the first of 1/49th of the entire interest. On $80,000,000, the annual interest rate is 5%, producing $4,000,000 per year. 1/49th of this is $81,632. This is the amount of the annual overpayment of interest for the second year, and which increases by the same sum for each year thereafter, to and including the forty-ninth.

We have then the case of an annual payment of $81,632, accumulated at 4½% for 48 years. Each dollar at the end of such period amounts to $161.59. The actual profit to the Interborough, therefore, on $80,000,000 covered by the 5% rate of interest, is $13,191,731. The interest rate on that part of $120,000,000 not covered by the 5% rate is probably in excess of 6%; but taking the latter to be the average, the progressive annual excess payment would be $48,978, which, accumulated at 4½%, at the end of the forty-ninth year lease would amount to $7,914,845.

Contract No. 3 carries a large profit on repayment of advances and overpayments of interest.

The total gain, therefore, by the Interborough on the excess interest payments during the life of the lease amounts to $21,106,576. This added to the total gain of $92,247,270 on the return of the principal investment, makes a total profit for the Interborough on the excess payments of principal and interest, amounting to $113,353,846.

Compound Interest Annuity and Sinking Fund Tables [Archer] *Edition of 1915, p. 64.*

At 4¼ per cent, the total profit on excess interest and return of principal would be $95,449,622; while at 4 per cent it would be $79,103,942. (Archer, *supra*, pp. 86, 87.)

Moreover, notwithstanding allegations of increased cost entering into prior deductions, such as operation, have not had the effect of preventing the Interborough receiving the stipulated deductions for its own use and behoof.

Where, then, is the claim for confiscation?

The valuation of $898,793,648 claimed by Interborough Rapid Transit Company as the basis of return of eight per cent. is inflated to the extent of at least $600,000,000.

The burden of proof on the claim of consfication is upon the Interborough Company.

> *Des Moines Gas Company* v. *Des Moines*, 238 U. S. 153, 163;
> *City of Knoxville* v. *Knoxville Water Company*, 212 U. S. 1, 9.

In the *Knoxville* case, at page 8, the Court says:

> "The constitutional invalidity should be manifest, and where that invalidity rests upon disputed questions of fact the invalidating facts must be proved to the satisfaction of the court. In view of the character of the judicial power invoked in such cases it is not tolerable that its exercise should rest securely upon the findings of a master, even though they be confirmed by the trial court. The power is best safeguarded against abuse by preserving to this court complete freedom in dealing with the facts of each case. Nothing less than this is demanded by the respect due from the judicial to the legislative authority."

And at page 9:

> "The first fact essential to the conclusion of the court below is the valuation of the property devoted to the public uses, *upon which the company is entitled to earn a return.*"

The Interborough Company demands "the required rate of return of eight per cent. upon such present value" of $898,793,648 (Complaint, LX.; R. 80, 82).

The total valuation of $898,793,648 appears at page 850 of the Record. It also appears at pages 780, 798, 808, and elsewhere. *Such total includes all of the property owned by the City of New York,* as well as that alleged to be owned by the Interborough Rapid Transit Company, and that leased by it from Manhattan Railway Company. This is the estimated cost of reproduction of all such properties (R. 849).

The valuations asserted are subject to severe reductions, which we propose to make item by item, with a brief statement of the reason therefor.

City property deducted, $342,380,600.

The first deduction to be made from this total is "property provided by City, $342,380,600" (R. 82) (comprising the items of $142,687,000 and $199,693,000, R. 850). This deduction is made for reasons given, *supra*, pp. 153-157, and upon the assumption that any return to which the Interborough Company may be entitled must be based upon private property, an investment or property of its own.

Company investment corrected, $90,998,289.

The next major item of deduction is "Company property, contract 3, $230,010,000" (R. 850). The reason this deduction is made is that under contract #3 the Interbor-

ough Company has no property whatever. Under that contract, title to all construction and equipment is in the City of New York (Contract No. 3, pp. 5, 6; Art. XLVII—"The City hereby leases the *Railroad and Equipment*"; Art. XLIV).

We substitute for this item, however, the *investment* of the Interborough under contract #3, amounting to $120,879,749 (R. 852), to which there has been added 15% to bring it to the City's recapture option price of $139,011,711, making the net deduction $90,998,289.

By the device attempted, the Interborough has sought to magnify the cost of reproduction in 1927 of the property of the City, toward which the Interborough's investment contributed. "Investment" is the term used in the Rapid Transit Act, as amended by the Wagner bill, to characterize the moneys so contributed and furnished by the Interborough. (*Rapid Transit Act*, §27, subd. 2, as added by Chap. 226 of the Laws of 1912.

Excess cost of Belmont Tunnel, $5,895,174.

Included in the Interborough's "investment" under contract #3 in its contribution of $58,000,000 (Art. IX) toward the cost of construction, was an allowance of $3,000,000 as the agreed price for the "Steinway" (Belmont) tunnel, theretofore partially constructed and then virtually abandoned by New York & Long Island Railroad Company, and held by it or the trustees of said New York & Long Island Railroad Company (Art. X). This was described in the offer of the Interborough dated February 27, 1912 (R. 545, 554). (For legal status of abandoned work, see *City of New York* v. *Bryan*, 196 N. Y. 158, 166). The valuation of $898,793,648 not only includes said $3,000,000, but it also includes $5,895,174 for the alleged "excess cost of Belmont tunnel" (R. 850).

Upon the assumption that no species of regulatory authority can change the contract price of $3,000,000 for the Steinway tunnel, we make the further deduction of $5,895,174.

Company property under contracts 1 and 2 deflated $69,788,000.

Next to be considered is $106,788,000 for "Company property, contracts 1 & 2" (R. 850).

The Court will scarcely recognize in this the Interborough's "capital investment" in contracts Nos. 1 and 2 of "approximately $48,000,000", recited in its offer of February 27, 1912 (R. 555), and upon which basis contract #3 was negotiated; notwithstanding the manifest inflation in such item at that time of at least $11,000,000.

The Interborough now shows, however, that "the original cost to it under contracts numbers 1 and 2 as shown by the books of account of the Interborough Company" was $60,496,038 (R. 852). It also shows that "the original cost" according to the "engineers" of the Transit Commission, at the end of 1927, was $47,088,080 (R. 854); which is in practical agreement with the claim of $48,000,000 upon which contract #3 was based.

Included in the Interborough's claim of $60,496,038 is a single item "cost of leases", $22,278,589 (R. 852). This represents nothing but manipulation in the corporate transactions and securities (R. 1054, 1170, 1171).

The assumed cost of $48,000,000, which is the basis of the terms of contract #3, by the theory of "cost of reproduction" became, in the Interborough's complaint herein, $106,788,000 (R. 849, 850).

If nothing more is done than to reduce the last mentioned sum to $48,000,000, it would still have improperly included therein an item of $11,000,000, as well as the further improper item of $22,278,589.

Contract No. 2 provided for the construction therein described for $3,000,000 (Contract No. 2, p. 22).

The contractor was Rapid Transit Subway Construction Company, a wholly owned subsidiary of Interborough Rapid Transit Company.

The Interborough claims that the actual cost to the contractor was $11,000,000 more than the contract price, and that it furnished this to its subsidiary (R. 1171).

There is no competent proof of either of such allegations. But it would make no difference if it were true. It is a contractor's loss. The same contractor had many other contracts with the City for subway construction; but no one has claimed that its profits under such contracts should be deducted in ascertaining the City's or the Interborough's investment. Neither its profits nor its losses are material.

For this reason and because the contract price was $3,000,000, we deduct $11,000,000 from the claim of $48,000,000 leaving it at $37,000,000. Even this sum is $16,000,000 more than the Interborough claims was paid in for its entire capital stock (R. 1085).

The only property which the Interborough Company has under contracts 1 and 2 is the equipment, the consideration for which was furnished by the City (*Contract #1*, pp. 17, 18), the title to which, however, remains in the contractor, "subject to the first lien of the City", until 1967, as security for the operator's obligations; at which latter date the City will pay the then value of what remains (*Contract #1*, p. 123).

Company property, elevated certificates, reduced to recapture value, $14,603,969.

The next item for consideration in the Interborough's claimed valuation of $898,793,648, is "Company property, elevated certificates, $65,338,000" (R. 850).

The total original cost of all of such work appears from the Transit Commission's engineers figures, furnished by the Interborough as $44,116,549 (R. 852).

This amount has been swollen by the Interborough's theory of cost of reproduction to $65,338,000. As hereinbefore pointed out, however, the City has a continuing option on the elevated additions and extensions to terminate the interest of the companies therein by recapture at any time after ten years, upon the payment of cost plus 15%. If it be assumed that the total, $44,116,549, be the actual cost, the addition thereto of 15% would make the option price at the present time not more than $50,734,031, showing an inflation of $14,603,969. This latter sum is, therefore, deducted.

Summary of subway deflation, $523,365,432.

The valuations of the Interborough, exclusive of the Manhattan Railway (original property) should therefore be reduced as follows:

City property, contracts 1 & 2		$142,687,000
City property, contract 3		199,393,000
Company property, contract 3	$230,010,000	
substituting therefor Interborough's investvestment under contract #3 $120,879,749, plus 15% for recapture valuation	139,011,711	90,998,289
Excess cost of Belmont Tunnel		5,895,174
Deflation of "Company property contracts 1 & 2" from $106,788,000 to $37,000,000 (being the Interborough's assumed cost of $48,000,000, less the improper inclusion of $11,000,000), the net deflation being		69,788,000
Company property, elevated certificates	65,338,000	
Deflation to actual cost $44,116,549, plus 15% for recapture valuation	50,734,031	14,603,969
Total inflation by Interborough on City owned subways and Company owned elevated extensions		$523,365,432

Interborough's Manhattan Railway Company valuations.

The detailed valuations of Manhattan Railway Company property set forth by the Interborough, as obtained from "Engineers of the Transit Commission" appear in the record at page 853.

The total of $112,943,654, by estimating "Present Value" on cost of reproduction theory, has been increased by the Interborough to $143,556,000 (R. 850).

There are certain items included in the valuations of Manhattan Railway which are manifestly improper.

> *Kansas City Southern Ry.* v. *United States*, 231 U. S. 423, 447.

"Discount of New York Elevated Railroad Company, Metropolitan Elevated Railway and Manhattan Railway Company Bonds, $6,974,285".

No attempt is made to state the discount, if any, on bonds of Manhattan Railway. The predecessor corporations, New York Elevated Railway Company and Metropolitan Elevated Railway Company, are long extinct.

The attempt to secure 8% return on the discount and obligations issued and disposed of by them shortly after the Civil War, should scarcely commend itself to the conscience of a court of equity.

"Amount of Par Value of Metropolitan Elevated Railway Company Capital Stock and Bonds Issued for Road Built by Contractor over Expenditures for Construction, $5,113,309".

The same observations apply to this item.

> "Intangible Street Railway Capital, $14,014,000".

Apparently this represents speculation in some street railway venture. In the absence of any definite proof that

it was any part of the actual cost of construction of the present elevated railroad, the burden of supplying which is upon the Interborough Company, it could not seriously be considered by a court of equity in such a case as this.

The valuations placed by the Interborough on the Manhattan Railway (original property) should therefore be reduced as follows:

Discount on bonds of predecessor corporations	$ 6,974,285
Bonus of stock and bonds given construction contractor by predecessor corporation	5,113,309
Intangible street railway capital predecessor corporations	14,014,000
	$26,101,594

The disallowance of the items hereinbefore specifically mentioned would reduce the valuation of the original Manhattan Railway property from $112,943,654, to $86,842,060. This allows nothing for the enormous depreciation and obsolescence that the property has undergone since its original construction shortly after the Civil War.

The cost of reproduction less depreciation is not a proper method of valuing an elevated railroad in the location of Manhattan Railway lines.

The affidavits of this defendant show that present value of the old elevated system is "an amount not to exceed $50,000,000" (R. 1057).

On the whole this appears to be excessive.

The total deflation in the Interborough's valuation of the Manhattan Elevated Railways should therefore be at least $93,556,000.

POINT VIII.

The Elevated Railroad Certificates for additional tracks and extensions are affected by like statutory authority and contract obligations.

Manhattan Railway Company owned certain elevated railroads in the Borough of Manhattan, constructed under legislative franchises prior to 1894. By Chap. 743 of the Laws of 1894, the Legislature fixed the rate of fare on certain minor parts of such railroads at five (5) cents. The acceptance of such rate by the Manhattan Elevated Railway Company may have been influenced by the circumstance that at the same time and by Chap. 752 of the Laws of 1894 the Legislature required the submission to the electorate of New York City of the question whether rapid transit railways should be constructed by the City, and at public expense; an act that was the direct result of the refusal of the Manhattan Railway interests to provide additional facilities; and which new municipal lines if constructed would be in direct competition with those of Manhattan Railway.

The elevated railroads continued to be operated for a five (5) cent fare at the time the Interborough on April 4, 1903, leased its lines for 999 years, under an instrument that left the Manhattan Company nothing but its corporate existence and a right of reverter (R. 1932). Three years prior to this the City of New York had entered into contract #1 with the Interborough's assignor, followed two years afterwards by contract #2, also with the Interborough's assignor; both of which contracts provided for a five (5) cent fare—one for at least fifty years and the other for thirty-

five years. The elevated lines were leased, therefore, by the Interborough, with the knowledge that for that length of time they were to be in direct competition with the City owned subways on a five (5) cent fare. That this was a highly speculative venture is indisputable.

Saving the elevated.

When the dual subway contracts were negotiated, Manhattan Elevated lines would have been left with constantly diminishing traffic had all of the new subways been awarded to the Brooklyn competitor of the Interborough in 1912; which was only averted at the last moment by a change of attitude by the latter. Confronted with liability on its lease, and outstripped by the enterprise and public spirit of the municipal authorities, the Interborough Company sought to save the future of the elevated lines (which had subsisted on intolerable congestion of population) by extending and connecting them with the new subways of the city and obtaining trackage rights over the latter for elevated trains. Only in this way could it hope to avoid the consequences of shifts in population and the disposition of the public to walk *down* into a subway rather than climb *up* to an elevated railroad station; even when they were of equal accessibility.

In its proposal dated February 27, 1912, the acceptance of which, with variations, was the basis of contract #3 and the accompanying elevated railroad certificates and contracts, the Interborough Company included the elevated lines and their third tracking, improvements and extensions, and sought trackage rights over certain of the new rapid transit lines to be constructed by the City of New York (R. 545, 548).

The Court's error as to the contract character of the elevated certificates.

In its opinion, the Statutory Court erroneously states:

> "The Extension Certificate was granted under the authority of §34 of the Rapid Transit Act (as amended by chap. 752 of the Laws of 1894) *and it is not claimed to have been given by the amendment of 1912,* but it is claimed to have the authority of §32(a) enacted by chap. 472 of the Laws of 1906, adopted one year before the Public Service Commission Act" (R. 1976-1977).

This is a wholly incorrect and unfounded view. Section 34 of the Rapid Transit Act as amended by Chapter 752 of the Laws of 1894 had no reference or relation to elevated railroads or their additional tracks or extensions. Sec. 32-a added to the Act by Chap. 472 Laws of 1906 was renumbered as Section 24 by Chap. 498 Laws of 1909, *and as amended by the Wagner bill* (Chap. 226 Laws of 1912), *authorized the certificates.* The Court was in complete error in its conclusion.

The act specifically provided that the acceptance of such certificates should constitute a contract between the City of New York and the grantee acording to the terms thereof (Section 24 subd. 4).*

The immediately material provisions of the Rapid Transit Act are as follows (italics ours):

> "Section 24. Connections with other railroads, stations and ferries. 1. The public service commission may also from time to time, *with the approval of the board of estimate and apportionment,* upon the application of any person, firm or corporation own-

* Note:—Section 24 is printed in full in the Record at pp. 1025-1032.

ing, leasing, constructing or actually operating . . . a railroad . . . within the limits of the city . . . if in the judgment of said commission, the public interests so demand, fix and determine the route or routes by which any such . . . corporation may connect with other railroads . . . or upon the application of a corporation organized under the railroad law for any of the purposes specified in subdivision nine of section twenty-seven of this act, *and agreeing to equip, maintain and operate or to procure to be equipped, maintained and operated, any road or roads of the city in connection with any existing railroad of a railroad corporation and any extension or extensions thereof wholly within such city*, on the basis of a division of income, earnings or profits as hereinafter provided, the commission may *with like approval* if in the judgment of the commission the public interests so demand, fix and determine the route or routes by which such corporation may construct, maintain and operate such extension or extensions, and *may with like approval* authorize such corporation to construct, maintain and operate such extensions, and *may with like approval* authorize any such person, firm or corporation to lay an additional track or tracks . . . ; and the commission shall *with like approval* fix and determine the locations and plans of construction of the railroads upon such route or routes and of such tracks and facilities, the times within which they shall be respectively constructed, the compensation to be made therefor to the city by said person, firm or corporation, *and such other terms, conditions and requirements as to the said boards may appear just and proper*, * * *. *Such determination, authorization or license shall contain a reservation to the city of the privilege, upon giving a specified notice, to terminate the franchise, right or*

authority granted under this section as to all, and if deemed advisable as to any specified portion or portions of such route or routes, additional track or tracks or facilities, and to purchase and take the plant and property as defined in the grant at any time after the expiration of ten years from the date when operation of any part of said route or routes, additional track or tracks or facilities or of such specified portion thereof shall actually begin, upon paying an amount for said plant and property as property, excluding any value for the franchise, right or authority, which amount shall not exceed actual cost as defined in the grant of said plant and property plus fifteen per centum thereof and shall decrease under provisions of the grant as the franchise continues, so that at the end of the full term of the grant or at the end of a period specified therein, no amount shall be paid except for betterments, additions, improvements and additional equipment as hereinafter provided.''

* * * * * *

4. The certificate or certificates prepared by the commission as aforesaid when delivered and accepted by such person, firm or corporation shall be deemed to constitute a contract between the said city and said person, firm or corporation according to the terms of the said certificate; and such contract shall be enforceable by the commission acting in the name of and in behalf of the said city or by the said person, firm or corporation according to the terms thereof, but subject to the provisions of this act. The terms of such contract may from time to time with the consent of such person, firm or corporation, be modified by the commission.''

At the outset there are four things to be observed in relation to the material features of the certificates author-

ized under the provisions of Section 24, subdivision 1, as amended. (a) The city is from the start a potential owner of all roads constructed thereunder. Its ownership may become absolute ten years after operations begin by the payment of cost plus fifteen per cent., and thereafter by lesser payments, until at the expiration of the period for which granted, without payment. (b) There is no limitation on the terms, conditions and requirements that the board of estimate and apportionment may insist be contained therein. That such terms, conditions and requirements may include rates of fare is not open to doubt; in any event it is not open to challenge by the Interborough Company, *for it accepted the certificate containing a five cent fare provision as the sixth of eighteen of such terms*, conditions and requirements expressed in the certificate (Certificate, "Public Service Commission for the First District to Interborough Rapid Transit Company, Webster Avenue Line," &c., pages 6, 12).* (c) The certificate could only become effective upon the board of estimate and apportionment giving the consent necessary under Article III, section 18, of the state constitution. (d) *Interborough Rapid Transit Company, as lessee of Manhattan Railway Company, was permitted to operate elevated trains over several miles of city owned rapid transit lines constructed under contract #3, which opened to it territory otherwise wholly inaccessible to the elevated service.*

The elevated railroads are of three classes:

(1) Elevated railroads constructed, and owned by Manhattan Railway Company, existing at the time its property was leased to Interborough Rapid Transit Company;

(2) Third, or additional tracks, authorized by certificate

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* Note.—This document was one of those submitted to the Court with the contracts in lieu of printing in the Record.

dated March 19, 1913, and in part constructed prior thereto, and thereafter completed, and in part wholly constructed subsequent to such date; and

(3) Extensions or new elevated railroads authorized by certificate dated March 19, 1913, and constructed subsequent thereto, and forming connecting links between the lines of Manhattan Railway Company and the Rapid Transit Railroads owned by the City of New York so as to permit of operation thereon of cars of Manhattan Railway Company, so that thereby it could obtain traffic from territory, where it had no lines of its own.

In order to make effective the additional facilities provided by the additional elevated tracks and extensions, the City of New York also granted to the Interborough Company trackage rights over the Rapid Transit lines of the City of New York, constructed under Contract #3, by virtue of which trackage rights the elevated railroad trains could be operated over the elevated railroads and city owned subway lines, access to the latter being had from the former over the intervening and newly constructed extensions for connecting links.

No rental was charged against the Interborough for the use thus made of Rapid Transit lines owned by the City of New York. No charge was made against the Interborough for the right to carry business to and from the Rapid Transit lines owned by the City of New York over the elevated extensions and additional tracks; except a theoretical participation in future profits which might never arise.

In the *certificate to the Interborough Company, Article VI provides as follows:

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* NOTE.—This document is one of those submitted to the Court with the contracts, in lieu of printing in the record.

"The Interborough Company shall be entitled to charge for a single fare for each passenger for one continuous trip in the same general direction over the Railroads (including the parts of the municipal railroad over which the Interborough Company is provided with trackage rights as in this certificate provided) and the additional tracks (which shall mean the additional tracks authorized by the Commission by certificate to the Manhattan Railway Company bearing even date herewith) and the Manhattan Railroad the sum of five (5) cents but not more. A trip from any point on the Queensboro Bridge Line (including the part of the municipal railroad over which trackage rights are provided) to any point on the Manhattan Railroad or on the Railroads, or a trip from any point on the Manhattan Railroad or on the Railroads to any point on the Queensboro Bridge Line (including the part of the municipal railroad over which trackage rights are provided) shall be deemed a continuous trip in the same general direction" (p. 12).

Article IX provides:

"The City also agrees to provide the Interborough Company with trackage rights over parts of the municipal railroads to be constructed and to be equipped, maintained and operated under a contract bearing even date herewith between the City and Interborough Rapid Transit Company and over any extensions of such parts, and the Interborough Company as grantee under this certificate agrees to operate over such parts in conjunction with the Railroads to the end that through service may be provided over such parts over the Railroads and over the Manhattan Railroad" (pp. 14-15).

The contract provision for a five (5) cent fare contained in the certificate for the elevated extensions and trackage rights was plainly in pursuance of the public policy of the City for the proper provision for necessary Rapid Transit facilities, *and by which it wholly subordinated the question of a return upon its own investment.* The fare provision was strongly fortified by a consideration of incalculable value to the Interborough Company as lessee of the elevated railways.

The Statutory Court's error as to the fare provision.

The statutory court has construed the five (5) cent fare provision in the elevated railroad certificate in such a manner as to require a higher fare for a short haul than for a long haul. In effect, it holds that there is one rate of fare of five (5) cents for a "continuous trip", but that it does not apply "to trips originating and ending on the line of the then existing Manhattan Railway Company" (Opinion, R. 1977-1978).

In other words, if a passenger traveled from 42nd Street to 59th Street on a local train on the Second Avenue line of the Manhattan Railway, he would have to pay a higher fare than if he made a continuous trip from 42nd Street over the Second Avenue Railway, the Queensboro Bridge (at 59th Street) and the City's Rapid Transit lines in the Borough of Queens.

The next difficulty with the construction of the learned statutory court is that the single fare of five cents is for a trip over the "Railroads", "Additional tracks", and the "Manhattan Railroad".

The "Railroads" are the four connecting lines or extensions known as the Webster Avenue line, the Eighth Avenue and 162nd Street connection, Queensboro Bridge line

and the West Farms Subway connection; and included therewith, the trackage rights over the City's Rapid Transit lines with which such extensions severally connect and are operated over.

"Additional tracks" are the third and additional tracks added to the pre-existing Manhattan Elevated Railway.

The "Manhattan Railroad" is the pre-existing elevated road, leased by the Interborough Company from the Manhattan Railway Company in 1903, before any additional tracks or extensions or connections were provided.

In conformity with one of the amendments in Sec. 24, subdivision 1, made by the Wagner bill (Ch. 226 L. 1912) the compensation to be paid by the Interborough Company to the City of New York for the rights granted under the elevated railroad certificates was one-half of the increase in the profits that might arise from the construction and operation of the lines covered by such certificates, which were to be determined in accordance with the following method:

The net profits of all of the elevated lines, old and new, were to be ascertained. If they exceeded the average annual net profits of the existing Manhattan Railroad for the two years ending June 30, 1911, one-half of such excess was to be paid to the City. In ascertaining whether there was any excess, there was first to be deducted from the gross revenues all items for taxes, rentals, operating expenses, maintenance, depreciation, $1,589,348, assumed to be the average profits for each of the two years ending June 30, 1911; interest and 1% per annum amortization on the bonds issued for the new elevated improvements; interest on bonds issued for power houses and sub-stations, transmission lines and electrical apparatus. Such deductions were to be made quarterly. After making all of such deductions,

the amount of revenue remaining "shall be the excess of net profits", one-half of which the City was to receive. If the revenues in any quarter were insufficient to meet the various obligations and deductions, the deficiency was cumulative, with interest and priority.

This method was calculated to return to the Interborough all of the outlays so made for new construction and operation, etc., and to assure it that the net profits of the elevated lines would not be diminished below the average for the two years ending June 30, 1911.

Nothing has ever been paid to the City of New York under this arrangement.

The contract provisions in relation to the elevated railroads, additions and extensions are controlled by the same principles of law that are applicable to the city-owned and contract operated Rapid Transit lines.

The fact that the elevated lines are privately owned does not exclude them from the application of the same principles that protect the city in an inviolable contract that is a complete answer to the allegation of confiscation. Though privately owned, subject largely to city ownership by its option to recapture, the elevated lines, old as well as the newly constructed additional tracks and extensions, are *contract* operated.

The very fare that it is sought to increase covers local business carried by elevated trains on the City's own rapid transit lines.

The provisions in the Rapid Transit Act in relation to such railroads are quite as comprehensive and explicit as those in relation to roads constructed at public expense and operated by contract.

The amendments made in the Public Service Commissions Law are as ineffective to release the Interborough from its contract obligations in regard to the elevated railroads as they are to subvert the purposes of contracts #1, #2 and #3.

We therefore refer to the statutes, decisions and discussion hereinbefore cited and had under Point III, *supra*, p. 85.

The very question here involved was decided by the Court of Appeals in *Admiral Realty Co.* v. *City of New York*, 206 N. Y. 110.

A precisely similar question was decided by that court in *Public Service Commission* v. *Westchester Street Railroad Company*, 206 N. Y. 209.

In each instance the result was adverse to that now sought by the Interborough Company.

The question whether certificates of the character of those granted the elevated railroad constitute a contract is not open under the New York law.

> *City of New York* v. *Hudson & Manhattan R. R. Co.*, 229 N. Y. 141, 145, 146.

Care should be exercised to note the difference between the provisions in Section 23 of the Rapid Transit Act (which prior to Chap. 498, Laws 1909, was Section 32) pursuant to which the franchise of the Hudson & Manhattan Railroad Company, owner and operator of an interstate road, was granted, and those contained in Section 24 of the act under which the elevated railrosd certificates were granted.

In *City of New York* v. *Hudson & Manhattan Railroad Company*, *supra*, at pages 145-146, the Court says:

> "The certificate issued by the board of rapid transit railroad commissioners to defendant, by the

> terms of the statute, *became a contract between the city and the defendant* on condition that the consent of the local authorities having control of the streets be first obtained. The local authorities could either unqualifiedly approve or disapprove the same, but their approval is free from all limitations other than those contained in the Rapid Transit Act (L. 1891, ch. 4, as amended) or the Constitution."

The explanation of this is found in subdiv. 7 of Sec. 23, which, after expressing the condition for the consent of abutting property owners and the consent of the local authorities, contains the following:

> "provided that such local authorities shall, upon the presentation to them of any such grant or contract, *without requiring the execution of any other agreements than those herein provided for, either approve or disapprove the same; and every such approval shall be and be deemed to be free of all limitations except those contained in this act or the constitution of the state.*"

This is in striking contrast with the provisions of Section 24 under which the elevated railroad certificates were granted, which not only omits any such provision as that above quoted, but expressly provides that the authorization of such additional tracks and extensions, besides determining the location and plans of construction, the compensation to be made to the City, must also include

> "such other terms, conditions and requirements as to the said boards may appear just and proper."

The opinion in the *Hudson & Manhattan case* is important, however, in emphasizing the fact that the certificate is a contract that binds both parties.

Section 24 in regard to the terms and conditions that may be inserted in the certificates is wholly unlike Section 23, under which the franchise for the Hudson Tunnel was granted. In the latter, the Board of Estimate and Apportionment was expressly forbidden to attach any terms or conditions of any kind. It could approve or disapprove, but, whichever it did, was unconditional.

The necessary effect, therefore, of the omission of any such provision from Section 24, with the inclusion therein of the express authority for

> "such other terms, conditions and requirements as to the said boards may appear just and proper"

is to require that the latter provision be construed to mean precisely what it says.

Elevated lines a thing of the past.

The Manhattan Railway Company was formerly a steam railroad. Its cars are old and of an antiquated type.

Today no one would erect an elevated railroad in the Borough of Manhattan. Consents from the local authorities would be unobtainable. The elevated railroad is now submitted to as an inconvenient form of transit, to be endured only until the work of constructing new subways has sufficiently progressed and public funds are available to compensate the owners for its demolition.

The Legislature has passed five acts authorizing the compulsory removal of part of the Third Avenue Elevated Railroad, the whole of the Sixth Avenue Elevated Railroad, and the purchase and removal of any or all of the elevated railroads leased to the Interborough Rapid Transit Company, as undue obstructions to street traffic.

Laws of 1917, ch. 788,
Laws of 1919, ch. 611,
Laws of 1924, ch. 41,
Laws of 1924, ch. 42,
Laws of 1926, ch. 824.

Already elevated structures on 42nd Street east of Grand Central Terminal, and on Sixth Avenue, north of Fifty-third Street, have been removed; to the great improvement of those thoroughfares.

Elevated supported by City's lines, but traffic declining.

The right to use the City's lines constructed under Contract #3, given to the Interborough as lessee of the Manhattan Railway, enables the Interborough to conduct a local and through business on many miles of City owned property.

Notwithstanding this, *in 1927 the Manhattan Elevated carried fewer passengers than it did in 1918*, the year before the new subways were opened.

In 1918 the elevated lines carried 352,660,669 passengers. In 1926, they carried 346,204,574 (Record, p. 1340).

When the contracts were negotiated, the Interborough estimated that in 1926 the Manhattan Elevated would carry 450,000,000 passengers (R. 620). While the Interborough estimated that the subway traffic in 1926 would be 775,000,000 passengers (R. 620), the actual number carried in 1927 was 814,626,596 (R. 1160), and in March, 1928, it was at the rate of 889,200,000 per year (R. 1103).

The elevated railroads are no part of the City owned subway system.

The Interborough Company has attempted to treat the properties leased by it from Manhattan Railway Company

and those owned by the City of New York as though they were part of a single system. Nothing could be further from the fact.

The only connection between the City owned subways and the Manhattan Railway Company is the fact that they have a common operator. The circumstance that free trackage rights have been granted to the Interborough Company as lessee of Manhattan Railway Company, over certain portions of the new rapid transit lines owned by the City, does not in any way create a single system. An illustration to the contrary is had in the well known case of the New York, New Haven & Hartford Railroad Company and the New York Central Railroad Company. The former has trackage rights into Grand Central Terminal over the tracks of the latter; or, more strictly speaking, over the tracks leased by the latter from New York & Harlem Railroad Company. It would never occur to any one that the New Haven Railroad and the New York Central Lines constitute "a single system."

So here, whether there is any confiscation (if that question be in the case), it depends in the case of the City owned lines on the operation and effect of contracts numbers 1, 2 and 3. Confiscation there cannot be created because the Interborough Company made an improvident guarantee on the elevated lines.

The City of New York should not be forced to change the rate of fare on its modern subways, built at public expense, merely because the owners and lessee of Manhattan Railway Company have given no heed to the changes wrought by time.

POINT IX.

The Court below was imposed upon. There is no federal question in the case.

In presenting its claim, the Interborough indicated its purpose not only to avoid the obligations of contract #3 in so far as they relate to the provisions for fare, *but it is also laying the foundation to repudiate in toto the obligation under which the City of New York is entitled to recapture all of the lines built under contract #3, after the expiration of ten years from the beginning of operation.* Its purpose is revealed in paragraph "XLV" of the complaint, in which it is alleged that the City of New York has pursued policies

> "which have forfeited and barred any rights of 'recapture' by the defendant, The City of New York, of any portion of the lines operated by the plaintiff" (R. 57).

This self-revelation of character is sufficient to subject every claim of the Interborough to the closest scrutiny. It is manifest that the claim of confiscation is wholly without substance, and, by obscuring the facts in a volumnious presentation to the court below, consideration was had, where jurisdiction does not exist.

LASTLY.

The order appealed from should be reversed and the application denied with costs.

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December 17, 1928.

FILED
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Supreme Court of the United States

OCTOBER TERM, 1928.

No. 159.

JOHN F. GILCHRIST, LEON G. GODLEY, and CHARLES C. LOCKWOOD, constituting the TRANSIT COMMISSION, etc., and THE CITY OF NEW YORK,

Appellants,

vs.

INTERBOROUGH RAPID TRANSIT COMPANY AND MANHATTAN RAILWAY COMPANY.

REPLY BRIEF FOR THE APPELLANT, THE CITY OF NEW YORK.

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REPLY BRIEF FOR THE APPELLANT, THE CITY OF NEW YORK.

The Interborough's brief makes no criticism of the statement of the case in this appellant's main brief.

It does not attempt to take issue with any of the legal contentions set forth in it.

In whatever form or manner expressed, and from whatever angle approached, and howsoever supported, whether by bald assertion or unsupported conclusion, the necessary result and effect of the contentions put forth for the Interborough Company may be expressed in these words: *That the Public Service Commissions Law repealed or annulled all provisions in the Rapid Transit Act at any time enacted authorizing contracts between The City of New York and John D. McDonald and Rapid Transit Subway Construction Company and their assignee, Interborough Rapid Transit Company.*

In the effort to maintain such a position, the Interborough Company has not hesitated to stultify itself to the extent of repudiation of all intent and authority on the part of itself and its officers to enter into the contracts under which their present claims are asserted, by virtue of being in possession of the City's properties.

POINT I.

The Interborough Company's contention that the provisions in the Rapid Transit Act for employment by the City of New York of "any person, firm or corporation" to operate its City owned rapid transit lines under contracts specifying the rates of fare and character of service were repealed by the Public Service Commissions Law is utterly destitute of merit.

Seventy-nine pages of the Interborough's brief are devoted to such contention.

Its argument opens and proceeds upon the assumption that Interborough Rapid Transit Company is a public utility corporation operating as a common carrier, a privately owned railroad, under a franchise fixing rates of fare.

It has no franchise (except the franchise to be a corporation). The subways are owned by the City of New York. The City specified through its boards, the rate of fare and character of service required, and contracted for operation on such terms.

The Interborough Company stands in the shoes of McDonald, the individual, and Rapid Transit Subway Construction Company, the business corporation, as their assignee respectively under contracts Nos. 1 and 2, operating as such assignee the additions and extensions thereto under

Contract No. 3. Its organization under the Railroad law adds nothing to its qualifications or rights, in performing the service which it is the duty of the City to provide; and as compensation for which it receives a specified portion of the income earnings or profits; *which by its election in excluding from the contract a provision for readjustment, by agreement, arbitration or judicial action, continues on the same basis for the term of the contract.* (See *Appellant's Main Brief, p. 68.*)

When the Interborough says that the Public Service Commissions Law "initiated a wholly new state policy of continuous regulation" (*brief, p.* 13) applicable to "the contracts here involved" (*brief, p.* 26) it asserts that the provisions in the Rapid Transit Act by which the City of New York provides for the operation of its roads under contracts containing terms fixing fares and character of service, have been superseded by the Public Service Commissions Law, and are thereby repealed, not expressly but by implication.

> "It was the negation of the method of attempting to deal by contract with the operations of a public utility for fifty years in the future" (*Brief, p.* 31).

Repeals by implication are not favored.

In *United States* v. *Winslow*, 227 U. S. 202, at p. 218, the Court said:

> "It was argued as an afterthought that the act of March 2, 1907, c. 2564, 34 Stat. 1246, under which the United States took this writ of error, was repealed by the Judicial Code of March 3, 1911, c. 231, 36 Stat. 1087, 1168. But it is not mentioned among the statutes expressly repealed by §297 of the latter act, it is not superseded by any other regulations of

> the matter, it is a special provision, and on principles similar to those discussed in *Ex Parte United States, Petitioner*, 226 U. S. 420, it must be held not to have been repealed. See further *Johnson* v. *United States*, 225 U. S. 405, 419; *Petri* v. *Creelman Lumber Co.*, 199 U. S. 487, 497."

In *Petri* v. *F. E. Creelman Lumber Company*, 199 U. S. 487, at p. 497, the Court says:

> "It is elementary that repeals by implication are not favored, and that a repeal will not be implied, unless there be an irreconcilable conflict between the two statutes. And especially does this rule apply where the prior law is a special act relating to a particular case or subject and the subsequent law is general in its operation."

In *Ex Parte United States, Petitioner*, 226 U. S. 420, at p. 424, the Court says:

> "When the issue is thus narrowed solution is readily reached by the application of the elementary rule that a special and particular statutory provision affording a remedy for particular and specific cases is not repealed by a general law unless the repeal be express or the implication to that end be irresistible. *Petri* v. *Creelman Lumber Co.*, 199 U. S. 487, 497."

Counsel for the Interborough, attempting to escape the effect, and manifest repugnancy to an implied repeal, of the subsequent amendment and reenactment of the provisions of the Rapid Transit Act, assumed to have been superseded by the Public Service Commission Law, argues that notwithstanding such subsequent amendment and reenactment, the provisions so reenacted are obsolete and should be disregarded.

It is asserted that the Rapid Transit Act does not import an intention that contracts made pursuant to it, after the enactment of the Public Service Commissions Law, should not be subject to regulation (*Brief, pp.* 38, 39).

Unable to point out a single legislative expression of such tenor, recourse is had to dogmatic negation. Ignoring its own demand for a contract for forty-nine years, and that "during the term of the contract" it should be entitled to charge "the sum of five (5) cents but not more", the Interborough now asserts that this was merely "an initial fare", which it is not barred from having increased (*Brief, p.* 40).

At page 45 of its brief, the Interborough states that

> "defendants attach altogether disproportionate significance to the term 're-enactment' ".

It points out that the New York Legislative practice of amendment of an existing statute takes the form of it "is hereby amended so as to read as follows:"

> "which language is followed by the entire section in its amended form. It was only in this sense that the old Section 34 of the Rapid Transit Act which contained the provision for the insertion of a contract as to fares, was 're-enacted' in 1909 and 1912 (*p.* 45). The language authorizing a provision regarding fares remained unchanged from the time of its enactment in 1894 through all of the 're-enactments' by which that section was in other respects amended between then and the year 1913 when Contract No. 3 was executed" (*Brief, p.* 45).

Then quoting a wholly inapposite provision of the General Construction Law, it continues for several pages its attempt to belittle and avoid the determined policy of the

Legislature in frequently amending and reenacting the requirement in Section 27 of the Rapid Transit Act that "every such contract", for the operation of City owned rapid transit lines

> "shall contain such terms and conditions as to the rates of fare to be charged and the character of services to be furnished" etc.

until finally, it boldly asserts that the amendment and reenactment in 1912 of such provision

> "is of no significance" (*p.* 52; reiterated, *p.* 56, last line).

The reason that it alleges that such amendments were "of no significance" is that

> "The language of Section 27 of the Rapid Transit Act relating to provisions as to the fare had been in the act since 1894 and was not touched in the statute of 1912" (*Interborough's Brief, p.* 52).

At page 81 of its brief, Interborough says:

> "But in New York the old method of contracting as to rates was superseded in 1907 by the method of regulation."

In this belabored fashion, the Interborough seeks to create the impression, that under New York Legislative practice, in amending a statute "so as to read as follows" the retention in such amendments of the former provisions of law have no legislative significance, and are to be regarded as obsolete and as wholly superseded by the provisions of a statute which it claims "by implication" changes "during the term of the contract" of forty-nine years, to "an initial fare", for which it seeks a forty per cent. increase.

Re-enactment continues the former statute in full force and effect.

Not only are such contentions wholly without force, but they are made in plain disregard of repeated decisions of the Court of Appeals of the State of New York, covering a period of three-quarters of a century.

We are indebted to the Interborough Company for a collection of the authorities contained in its brief in the Court of Appeals in *People ex rel. Interborough Rapid Transit Company* v. *State Board of Tax Commissioners*, 195 N. Y. 618 (affirming 126 App. Div. 610), quoted in our main brief at p. 65.

The authorities cited are to support the contention there presented by the Interborough that

> "It is the well settled law of this state that such a re-enactment ['is amended to read as follows:'] is a recognition and declaration on the part of the Legislature of the existence in full force of the provision of law amended."

Among the numerous decisions of the Court of Appeals of the State of New York on this subject are the following:

Humphrey v. *Parsons*, 15 N. Y. 595;
Moore v. *Mausert*, 49 N. Y. 332;
Matter of Rochester Water Commissioners, 66 N. Y. 414;
People ex rel. Steiner v. *Morrison*, 78 N. Y. 84;
Whipple v. *Christian*, 80 N. Y. 523;
People ex rel. Strough v. *The Board of County Canvassers of Jefferson County*, 77 Hun 372;
Matter of Prime, 136 N. Y. 347;
Carroll v. *McArdle*, 216 N. Y. 232.

In *Humphrey* v. *Parsons, supra*, at p. 597, the Court says:

> "Denio, *Ch. J.* The amendment of the Code of Procedure, upon which the question in these cases depends, declares that section 11 of the existing Code is amended 'so as to read as follows:' and the section is then copied with the changes intended to be made * * *. In other respects the section, as amended, is the same as it was before the amendment."

At page 598:

> "The portions of the amended sections which are merely copied without change are not to be considered as repealed and again enacted, but to have been the law all along; and the new parts, or the changed portions, are not to be taken to have been the law at any time prior to the passage of the amended act."

In *Moore* v. *Mausert, supra*, at p. 334, the Court says:

> "*Grover, J.* In Ely v. Holton, 15 N. Y. 595, it was decided by this court that the effect of an amendment of a statute made by a subsequent statute declaring that such statute shall be amended so as to read as follows, retaining a part of the statute amended and incorporating therein new provisions, was not to repeal the part retained and reenact the same, but that such part of the statute continued in force from the first enactment, and that the new provisions incorporated became operative from the time the amendatory statute took effect."

In *Matter of Rochester Water Commissioners, supra*, at p. 421, the Court says:

> "The intent to continue the original section in force, with this new clause added, is made more

> apparent by reference to chapter 39 of the Laws of 1875, passed five days thereafter, which re-enacts section 23 of the act of 1872, with section 23 of chapter 33 of 1875 added to it. The amendment was accomplished in the same form by enacting that the original section should be 'amended so as to read as follows,' and then inserting the original section and the supplement as one section."

People ex rel. Steiner v. *Morrison, supra,* involved the question of a repeal by implication. Curiously enough, as in the case at bar, the supposed repeal was discovered many years after it was alleged to have occurred.

It appeared that the act alleged to have been repealed was the subject of subsequent amendment by the Legislature. At page 89, the Court says:

> "By chapter 642 of the Laws of 1874, the amendatory act last referred to is amended by inserting further provisions relative to excise commissioners in the city of New York.
>
> These acts of the Legislature, especially that passed in 1873, at the same session as the charter, and on a subsequent day, amending the provision alleged to be superseded by the charter, clearly show that the Legislature regarded the original provision of the act of 1870 as still in force and applicable to the city of New York, and are sufficient to control the general language of the charter. In *Smith* v. *People*, 47 N. Y. 330, 339, it was held that where an entire act had been in express terms repealed by its title, and afterward, at the same session, an act was passed which indicated that the Legislature assumed that certain provisions of the repealed act were still in force, even the express general words of repeal were controlled and qualified by this evidence of the intention of the Legislature not to repeal the par-

ticular provisions in question. A much stronger case is presented here, where there is no express repeal, and where the very provision claimed to be impliedly repealed or superseded is afterward amended."

Matter of Rochester Water Commissioners, supra, was followed in *Whipple* v. *Christian, supra.* In that case, at pp. 525-527, the Court says:

"The act of 1858 (*supra*) does not in terms repeal the act of 1844. It contains these words:

"'§2. All acts, and parts of acts, inconsistent with this act are hereby repealed,' and the act of 1854 (Chap. 402, *supra,* §24) declares that 'all acts heretofore passed for the better security of mechanics and others erecting buildings and furnishing materials in either of the above counties, are hereby repealed.' As Ontario county was not one of the counties named in the act of 1854, it of course was not affected by this provision. Nor could the repealing clause in the act of 1858 affect it. There was no repugnance or inconsistency between the provisions of the act of 1844 (*supra*) and the act of 1854. The first is a special law prescribing the method of securing a lien in favor of mechanics and others in cities and villages. The second related to certain counties, and designated proceedings in favor of the same class of creditors in those localities. Neither the act of 1854 nor that of 1858 referred in terms to the act of 1844, and neither can be so construed as to impair the force of its provisions, unless we depart from the well-settled rule that a special act will not be deemed repealed by implication in consequence of the passage of a general law, containing a general repealing clause of inconsistent legislation. *In re The Evergreens,* 47 N. Y. 216; *Bowen* v. *Lease,* 5 Hill, 225; *Vil. of Gloversville* v.

Howell, 70 N. Y. 287; *In re D. & H. Canal Co.*, 69 id. 209. It is said that 'the life of a statute does not consist in the words, but in the sense and meaning of it;' but here we find no express language referring to the act of 1844, nor can we gather from it any intention to abrogate it. As we look at later legislation, we shall also find conclusive evidence that there was no such intention in the minds of those who formed the statutes. The act of 1844 was amended in 1845 by making the liens and judgments under its provisions subject to the control of the Court of Common Pleas of the county in whose clerk's office they were filed or docketed. In 1851 a very material amendment was made in section 2 of the act of 1844, in respect to labor performed or materials furnished in the city of Buffalo. Laws of 1851, chap. 517. Twenty years later, and therefore after the passage of the acts of 1854 and 1858, the act of 1844 again came directly to the mind of the Legislature, and a law was passed, entitled 'An act to amend the act entitled "An act for the better security of mechanics and others erecting buildings and furnishing materials therefor in the several cities of this State (except the city of New York), and in the villages of Syracuse, Williamsburgh, Geneva, Canandaigua, Oswego and Auburn,"' passed May 7, 1844. Laws 1871, chap. 872. The amendments were material, and applied in express words to section 2 of the act of 1844, the amending act consisting of thirteen sections, and in the eleventh section the full title of the act of 1844 is again inserted, and the act of 1851 (*supra*) is repealed. Not only then from the title, but also from the body of these several amendments, we learn that the attention of the Legislature was directed to the statute in question, and the enactment of these amendments amounts to a legislative declaration that except as

amended, the original act was in force (*In re Rochester Water Commrs.*, 66 N. Y. 414) or an implied affirmation of its continued validity and force. *Smith* v. *People*, 47 id. 330."

In *People ex rel. Strough* v. *The Board of County Canvassers of Jefferson County, supra*, it was contended that a certain section in an act of 1856 was repealed by implication by an act of 1864. It appeared that in 1883 the Legislature amended the section of the act of 1856 in the customary manner, "so as to read as follows:" At page 375, the Court says:

"Chapter 414, Laws of 1883, which was an act entitled: 'An act to amend section sixteen of chapter one hundred and seventy-nine of the Laws of eighteen hundred and fifty-six, entitled "An act to provide for a more thorough supervision and inspection of common schools, and further to amend the statutes relating to public instruction in the State,"' was as follows: 'Section 1. Section sixteen of chapter one hundred and seventy-nine of the Laws of eighteen hundred and fifty-six is hereby amended so as to read as follows:" [Here followed the full section as amended]

* * * * * *

"Thus, at the outset, we are presented with the question whether section 16 was repealed by implication. Repeals by implication are not favored in the law, and the inconsistency or repugnancy of two statutes must be such as to be impossible of reconciliation, or the former will not be held to be thus repealed" (Citing cases).

At page 376:

"Moreover, we think the fact that the Legislature in 1883 amended section 16 of the Laws of 1856 was

a clear indication that it regarded that section as still in force and applicable to the special cases mentioned therein" (Citing cases).

In *Matter of Prime, supra,* at page 355, the Court says:

> "We conceive the general rule to be that when a statute amends a former statute 'so as to read as follows,' it operates as a repeal by implication of inconsistent provisions in the former law, and of provisions omitted in the amended law. Where the amended act re-enacts provisions in the former law, either *ipsissimis verbis* or by the use of equivalent, though different, words, the law will be regarded as having been continuous, and the new enactment as to such parts will not operate as a repeal so as to effect a duty accrued under the prior law, although, as to all new transactions, the later law will be referred to as the ground of obligation."

Carroll v. *McArdle, supra,* was another case where there was a claim of a repeal by implication of a special or local law, by a general law. At page 234, the Court said:

> "After the passage of the General Tax Law in 1896 and by chapter 300 of the Laws of 1897, material and quite extensive amendments were made to the Westchester Tax Law, and again by chapter 338 of the Laws of 1901 important amendments were made to section 7 of that law. Thus it appears conclusively that the legislature did not intend to repeal or at least believed and assumed that it had not repealed the local statute. In addition it is stated without contradiction that during all of these years the authorities of the various towns of Westchester county have proceeded upon the theory that the local statute was still in force, and that proceedings for the collection of taxes and the sale of lands in payment thereof have been conducted under it.

Under these circumstances we think that we should hold that there was not an intent upon the part of the legislature to repeal by implication."

Interborough Company consistently ignores Legislative action subsequent to the passage of Public Service Commissions Law, destructive of its pretensions.

The attitude of the Legislature, in regard to the continuance in force of the provisions contained in Section 27 of the Rapid Transit Act, as to the rates of fare and character of services to be prescribed in contracts for the operation of City owned subways, does not rest alone upon the consistent and repeated amendment and re-enactment of such provisions.

On May 22, 1908, there became a law, with the approval of the Governor, Chapter 472 of the Laws of that year, to take effect immediately, entitled "An Act to amend chapter four of the laws of eighteen hundred and ninety-one, entitled 'An act to provide rapid transit railways in cities of over one million inhabitants,' in regard to the purchase by such cities and the equipment, maintenance and operation of railways for rapid transit purposes."

Chapter 472 of the Laws of 1908 added a new section to the Rapid Transit Act, to be known as 34-f. It provided:

"§ 34-f. The public service commission of the first district, successor of the rapid transit railroad commissioners, may, with the approval of the board of estimate and apportionment, or other analogous local authority of such city, purchase for such price and upon such terms and conditions as may be agreed upon, and acquire by conveyance or grant to such city, to be delivered to said board, any line or lines of railway already constructed or in process of construction of the character which might be con-

structed as a rapid transit railway or railways under the provisions of this act, and which in the opinion of the board it is for the interest of the public and the city to acquire for rapid transit purposes."

Having authorized the purchase of such a railway, the act then proceeded to provide for its operation.

> "As soon as such consents shall have been obtained, the said board for and on behalf of said city may, with the approval of the board of estimate and apportionment or other analogous authority of such city, enter into a contract with any person, firm or corporation for the equipment of any railway purchased as aforesaid at the cost and expense of such contracting person, firm or corporation, and for the maintenance and operation of such railway or railways for a term of years to be specified in said contract not to exceed twenty-five years, with a covenant for one renewal of not to exceed twenty-five years. Every such contract shall contain such terms and conditions as to the rates of fare to be charged and the character of services to be furnished and the rental to be paid, or the terms upon which such railway or railways are to be operated, as the said public service commission of the first district, successor of the board of rapid transit railroad commissioners, shall deem to be best suited to the public interests and as the said board of estimate and apportionment or other analogous body shall approve."

The provision thus set forth is not a re-enactment with amendment of a pre-existing provision. It is the enactment of an entirely new provision of the same character, to be applicable to the new situation created.

Moreover, it amplified the former provisions by the requirement that "every such contract" shall contain not

only terms and conditions as to rates of fare and character of services, but also "the rental to be paid, or the terms upon which such railway or railways are to be operated."

Alleged standard of non-permanency attributed to Public Service Commissions Law finds no support in subsequent amendments to Rapid Transit Act.

At page 42 of the Interborough's brief, it is asserted that, tested by the standard of the Public Service Commissions Law, it is doubtful whether fifty year contracts were "suited to the public interest."

This is an amplification of the argument at pages 31 and 32 of the Interborough's brief, that fifty years was such a great period of time as to necessarily require the negation of any authority for a contract for such a period.

Referring to the alleged policy of the Public Service Commission Law, counsel for the Interborough asserts:

> "It was the negation of the method of attempting to deal by contract with the operations of a public utility for fifty years in the future" (*p.* 31).

Such alleged policy is assumed to have been justified by the increase in population in New York in half a century and the progress of transportation from horse cars to more modern facilities.

Contemplating,

> "What changes of conditions may occur in the nearly forty years which remain of Contract No. 3,"

counsel for the Interborough asserts that the future

> "may not even now be forecast" (*p.* 32).

Such a state of mind did not preclude the Interborough in 1913 from insisting upon a contract for forty-nine years, and that

> "during the term of the contract"

it should be entitled to charge the specified fare of five (5) cents.

The Interborough's brief contains no intimation of what its attitude would now be if it had an opportunity to contract for a seven (7) cent fare for a period of fifty years from the present.

The assertion (*Brief, p.* 42) that fifty year contracts for the operation of City owned subways were not within legislative intent at the time that it enacted the Public Service Commissions Law, is wholly refuted by the action of the Legislature in the passage of Chapter 472 of the Laws of 1908. This was done one year after it had enacted in the Public Service Commissions Law, that the Commissioners for the First District, in addition to their regulatory powers in relation to street railways, gas companies, and other public utilities

> "shall have and exercise all powers heretofore conferred upon the board of rapid transit railroad commissioners"

under the Rapid Transit Act, and that

> "all the powers and duties of such Board conferred and imposed by any statute of this State shall thereupon be exercised and performed by the Public Service Commission of the First District" (*Chapter 429 of the Laws of 1907, §5, subdv. 6, §83;* quoted in *Appellant's Brief, pp.* 96, 97).

When the legislative bill that became Chapter 472 of the Laws of 1908 came to the Governor, it contained a provision that a contract for the operation of the rapid transit railways thereby authorized to be acquired by purchase by The City of New York, should be

> "for a term of years to be specified in said contract, not to exceed twenty-five years, with a covenant for one renewal of not to exceed twenty-five years."

This immediately preceded the requirement that

"Every such contract shall contain"

the terms and conditions as to fares and services.

There is a plain, unequivocal authority to contract for an aggregate period of fifty years.

If there were any such legislative intent or policy as counsel for the Interborough now attribute to the Legislature, or if there were anything inherently unsound as a matter of policy, or any inconsistency with any other provision of law, it was the duty of the Governor of the State of New York to veto such bill when it reached his desk. The fact that the Governor unhesitatingly signed the bill, is conclusive evidence that there was no such legislative intent or policy as counsel for the Interborough now imagine and conjure up to change the fare specified "during the term of the contract", to an "initial fare".

When it came to the revision of the Rapid Transit Act as embodied in Chapter 498 of the Laws of 1909, signed by the Governor two years after he had approved the Public Service Commissions Law, we find that the provisions of Chapter 472 of the Laws of 1908 are re-enacted as Section 32 of the Rapid Transit Act, where it still continues in full force and effect.

Nor is this all.

Among the new provisions which were included in the Rapid Transit Act, as amended by Chapter 498 of the Laws of 1909, were two new sections known as "thirty-three" and "thirty-four".

Section thirty-three conferred authority upon the City to

> "enter into a contract for construction at the public expense and for equipment, maintenance and operation"

of extensions or additions to its then existing subways, "in either of the two following ways:

> "1. With the person or corporation then having the contract for operation
>
> 'as extra work under the terms of said existing contract * * * the said railroad, when completed, to be subject to the terms and conditions of the said original contract, except so far as shall be otherwise specified and agreed.'
>
> "2. Under the provisions of Sections twenty-six, twenty-seven and twenty-nine, so far as the same may be applicable, with the person or corporation operating such existing railroad as lessee thereof, in which case the contract for maintenance and operation of said proposed railroad shall be for a term of years to be specified in said contract, which may be until but not beyond the date at which the original lease or contract for operation of such existing railroad, and any renewal of the term thereof, provided for in such contract, shall expire."

Contract No. 1 then expired in 1954, with a right of renewal by the operator for 25 years; while No. 2 expired in 1943, with a right of renewal for 25 years (*Interborough's Brief, p. 60*), making the respective expiration dates after

renewal 1974 and 1968; the one being sixty-five years from the enactment of Chapter 498 of the Laws of 1909, and the other being fifty-nine years therefrom.

Under the first plan authorized, by the new Section 33, new lines constituting extensions and additions would be operated until those respective dates, if constructed

> "as extra work under the terms of such existing contract."

If constructed under the provisions of Sections 26, 27 and 29 (which provide for municipal construction) the expiration date would be the same.

It is manifest that if there were any such legislative policy affecting New York City's subways as is now asserted in the Interborough's brief, it would have been the duty of the Governor to veto the bill containing the foregoing provisions. The fact that the Legislature enacted, and the Governor approved the bill, once more, conclusively refutes the claims of the Interborough.

In new Section 34, as added to the Rapid Transit Act by Chapter 498 of the Laws of 1909, was the provision that every such contract

> "shall also make provision to assure supervision by the Commission of all operations"

of the contractor.

The striking significance of this provision is that it negatives the idea of supervision under the Public Service Commissions Law. If the supervision under the Public Service Commissions Law extended to the City owned subways, it would be wholly unnecessary that such supervision should be made the subject of a contract obligation.

It has been pointed out in our main brief (p. 99) that Section 27 was amended, by the addition of new matter, and re-enacted by Laws of 1910, Chapter 504.

By Chapter 226 of the Laws of 1912, Section 16, said Section 33 was amended and re-enacted, a notable part of the amendment being that it authorized the City to make such contracts

> "without advertising for proposals, but only after a public hearing, under Section 37 of this act."

In the course of such amendment, in 1912, it was provided that

> "Such contract may be under and pursuant to the provisions of sections twenty-six, twenty-seven and twenty-nine."

of the Rapid Transit Act.

By that measure the Legislature expressly authorized the City of New York to include in the contract a provision for the retention by the Interborough Company

> *"for each year of the term of such contract"*

of a preferential of

> "a specified sum of money, which sum may represent the average annual income from the operation of the said railroad or railroads theretofore constructed and operated by such corporation for any two or more years."
>
> *Wagner Bill*, Appendix, p. 144, lines 6, 9-12;
> *Rapid Transit Act*, Sec. 27, subdiv. 2, as added by Ch. 226 of the Laws of 1912.

This is the preferential of $6,335,000 per year, product of the five-cent fare under contracts numbers 1 and 2, the

continuance of which was exacted by the Interborough as a condition of making contract No. 3.

The provision that this excessive yield should be protected in the contract

"for each year of the term of such contract"

cannot be reconciled with the present contention of the Interborough.

The Silent Appendix.

Accompanying the Interborough's brief is an appendix of 268 pages, stated to contain, among other things, "pertinent parts" of the Rapid Transit Act and other statutes; annotated for the information of the Court.

There nowhere appears in such appendix any reference whatever to Chapter 472 of the Laws of 1908 or Section 32 of the Rapid Transit Act as revised by Chapter 498 of the Laws of 1909, embodying such chapter as Section 32.

Nor does such appendix contain any reference to Sections 33 and 34 of the Rapid Transit Act as added by Chapter 498 of the Laws of 1909, and both of which were amended by the Laws of 1912, Chapter 226, Sections 16 and 17 respectively.

In the light of this constant and repeated amendment, amplification and re-enactment of Section 27 and like provisions of the Rapid Transit Act, continuing down to the execution of the contracts involved herein, pursuant to the amendments of 1912, the contentions now put forward by the Interborough are utterly destitute of merit.

The Interborough Company's effort to fit the Rapid Transit contracts into the definition provisions of the Public Service Commissions Law is unavailing.

Its brief makes no distinction between City owned subways and privately owned elevated railroads, referring to both indifferently as "rapid transit railroads" (p. 28); and assumes the City owned subways to be "a public utility" (p. 31).

The Interborough Company's effort to subject to the Public Service Commissions Law the contracts pursuant to which the Interborough Company, as assignee respectively of McDonald and Rapid Transit Subway Construction Company, performs for the City of New York the duty of operating its subways, is by fitting itself into the definitions of that statute.

It claims that it is a railroad corporation and a common carrier and that rapid transit railroads are street railroads; and that the Public Service Commissions Law relates to all of such things.

Even if this were all true, it would not preclude the Legislature from controlling the operations of such railroads, common carriers, and street railroads, through the special statute, the Rapid Transit Act, pursuant to which privately owned railroads are made subject to contract obligations to New York City, in the furtherance of a great City purpose; and by which a railroad corporation or a common carrier would be obligated by contract to operate for the City of New York its railroads constructed at public expense, upon terms and conditions authorized by the Rapid Transit Act, and expressed in such contracts.

The City of New York may contract for the construction and/or operation of its subways with

"any person, firm or corporation."

The fact that the Interborough Company is a railroad corporation does not disqualify it from standing in the shoes of McDonald, a "person", or Rapid Transit Subway Construction Company, a "business corporation"; but it does not change the nature of the City's contract.

If a bank or trust company should succeed to the rights and obligations of McDonald or Rapid Transit Subway Construction Company, either in its own capacity or as a trustee or receiver, it could scarcely be claimed that the City of New York was thereby subject to the banking laws.

Entirely aside from the foregoing, the effort to bring the contracts between the City of New York and the Interborough Company within the scope of the Public Service Commissions Law, must fail.

The Public Service Commissions Law is entitled

"An Act

To establish the public service commissions and prescribing their powers and duties, and to provide for the regulation and control of *certain public service corporations* and making an appropriation therefor."

Laws 1907, ch. 429.

It would scarcely occur to any one that "certain public service corporations" would be descriptive of the City of New York.

"The scheme of the act is to create public service commissions for the regulation and control *of certain*

public service corporations. Every section of the act bears directly upon the general scheme."

Gubner v. *McClellan*, 130 App. Div. 716, 721.

At the outset, therefore, this act does not even purport to refer to the rapid transit railroads, constructed by the City of New York at public expense, and operated for it by contractors, all under the authority of the special statute, the Rapid Transit Act.

The total exclusion of the properties of the City of New York from the scope of the Public Service Commissions Law affirmatively appears in the very section which confers jurisdiction upon the commissions created; for it appears therefrom that the Commission in the First District

> "shall have and exercise all powers heretofore conferred upon the board of rapid transit railroad commissioners"

under the Rapid Transit Act (*Laws 1907, ch. 429, §5, subdv. 6*); and by equally mandatory language, upon their succeeding to the offices of the Board of Rapid Transit Railroad Commissioners, the act requires:

> "All the powers and duties of such board conferred and imposed by any statute of this state *shall thereupon be exercised and performed by the public service commission of the first district*" (*ib.*, §83).

By the repeal provision, the whole of the Rapid Transit Act remains in force, except Sections 1, 2 and 3, relating to the name and method of appointment of the former commissioners (*ib.* §87).

The powers and duties thus conferred upon and required to be exercised by the Commission in the First Dis-

trict are "in addition" to the other duties of such Commission arising from the Public Service Commissions Law, and are not "subject thereto."

A close analysis of the Public Service Commissions Law serves but to confirm the foregoing.

By §1, it

> "shall apply to the *public services herein described.*"

This excludes those not enumerated or described. (*People ex rel. Kelly* v. *Public Service Commissions*, 171 App. Div. 810, 813.)

> "The term 'corporation', when used in this act, includes a corporation, company, association and joint-stock association" (§2).

It is manifest that this definition does not include a municipal corporation.

The last paragraph of the definitions section provides:

> "The term 'municipality', when used in this act, includes a city, village, town or lighting district, organized as provided by a general or special act."

This definition has relation to Article IV. of the statute, containing

> "Provisions relating to gas and electric corporations; regulation of price of gas and electricity."

Municipalities are expressly included in such article and are referred to in sections "66", "68", "70", "74".

The exclusion of municipalities and municipal corporations otherwise is emphasized by the provisions in sections 46 and 66, in relation to annual reports.

Section 46 relates to

> "Reports of common carriers, railroad corporations and street railroad corporations".

It contains no allusion to municipalities or municipal corporations.

On the other hand, Section 66, subdvs. 6, 7, relate to reports of gas and electrical corporations.

Subdivision 6 requires "every person and corporation" to make such a report; while subdivision 7 requires

> "each municipality engaged in operating any works or systems for the manufacture and supplying of gas or electricity"

to make such reports.

This juxtaposition of the terms "corporation" and "municipality" but emphasizes that the former excludes the latter.

The definition of the term "street railroad" (§2, subdv. 5), manifestly has no relation to the road or roads constructed at the City's expense, which the Rapid Transit Act provides

> "shall be and be deemed to be *a part of the public streets and highways of said city.*" (*Laws 1894, ch. 752, §63;* quoted this appellant's main brief, p. 10.)
>
> "By the Rapid Transit Law and the acts amendatory and supplemental thereto, the special franchise as well as the road itself is the property of the city, and *is merged in and became a part of the public highway for the public use.*"
>
> *People ex rel. Interborough Rapid Transit Company* v. *Tax Commissioners*, 126 App. Div. 610, 611; (aff'd 195 N. Y., 618). (Quoted this appellant's main brief, p. 65.)

The definition of the terms "street railroad corporation" and "railroad corporation", excludes any suggestion or implication that such terms could refer to a "municipality" or "municipal corporation".

> "The right and franchise to operate its railroad under contracts under the *special statute*, vested in the City *as a municipal corporation, not as a railroad corporation or private carrier. (Sun Printing & Publishing Assn.* v. *Mayor, etc. of N. Y.*, 152 N. Y. 257, 267.)" *City of New York* v. *Brooklyn City R. R. Co.*, 232 N. Y. 463, 420. (Quoted this appellant's main brief, p. 63.)

> "The city itself was not given the power of a railroad corporation * * *."
>
> *People ex rel. Interborough Rapid Transit Company* v. *Tax Commissioners, supra.*

The term "common carrier" includes all railroad corporations and street railroad corporations (§2, subdv. 9); but it obviously does not include the municipal corporation of the City of New York. (Cases cited, *supra.*)

In *People ex rel. Kelly* v. *Public Service Commission*, 171 App. Div. 810, at p. 813, the Court says:

> "It must be held that the definition of 'common carrier' excludes all those agencies not enumerated."

Claim negatived by contract provisions.

The application of the Public Service Commission Law to such contracts is wholly negatived by two provisions of Contract No. 3 as follows:

> "The word 'COMMISSION' to mean the Public Service Commission for the First District, in so far as it acts herein as the agent of the City, and any other

board, body, official or officials, to which or to whom the powers belonging to the Commission under the Rapid Transit Act shall, by virtue of any act or acts, hereafter pass or be held to appertain" (Contract No. 3, Art. II, subdv. 2).

"This contract is made pursuant to the Rapid Transit Act which is to be deemed a part hereof as if incorporated herein" (Contract No. 3, Article III).

The failure to make any similar provision with respect to the Public Service Commission Law is a distinct admission of its inapplicability.

Manifest incongruity of contention for regulation.

Moreover, the manifest incongruity of the contention that the Public Service Commissions Law is applicable to the provisions required by the Rapid Transit Act (§27) in relation to fares and service to be contained in every contract for the operation of the City's subways, cannot be escaped.

Under the Rapid Transit Act, the contract containing the specifications of fares and character of service, could be made by the Public Service Commission in its capacity as successor of the Board of Rapid Transit Railroad Commissioners, and acting for the City, *only with the approval of the Board of Estimate and Apportionment.*

Yet, according to the contention advanced by the Interborough Company, immediately after such approval had been obtained, the fares and character of service so specified could be entirely altered by the Public Service Commission under its regulatory powers, and, although consisting of the same persons who, under the Rapid Transit Act proposed and executed the contract, could review, re-

vise and reverse their own action and wholly annul the approval of the Board of Estimate and Apportionment.

This contention is considered in this appellant's main brief, pp. 100-101; 134, 136.

In addition to such absurdities and inconsistencies are the provisions of the Rapid Transit Act imposing upon the Board of Rapid Transit Railroad Commissioners and its successors, the duty of enforcing the rapid transit contracts by actions and proceedings "in the name of and in behalf of the said City" against the operating contractor.

By Chapter 573 of the Laws of 1924, such duties devolved upon the Transit Commission. Such provisions are discussed at pp. 118 and 119 of this appellant's main brief; where attention is called to the fact that the express preservation of its right to enforce the contracts under the Rapid Transit Act is totally destructive of the idea that the Transit Commission may regulate them under the Public Service Commission Law.

"Practical construction" avoided.

At page 68 of its brief Interborough Company advances contention based upon "administrative construction" of the Public Service Commission Law.

The Interborough avoids any argument based upon "practical construction" of the statutes by the parties to the contracts. Such a discussion would necessarily involve the acts and declarations of the Interborough Company and its officers, referred to in our main brief at pp. 25-27; 30, 32; 37, 55.

Its contention of administrative construction is based upon matters entirely outside the record.

It quotes the declarations of the first Board of Rapid Transit Commissioners, and prints a summary of cases alleged to have been considered by the Public Service Commission. Its argument is that such cases, for the most part relating to obligations arising under the Rapid Transit contracts, and which are enforceable by the Public Service Commission of the First District as successor to the Board of Rapid Transit Railroad Commissioners, were according to recitals in the records, dealt with by such Commission in its regulatory capacity.

There is nothing in the Public Service Commissions Law that requires that any member of the Public Service Commission shall be an attorney or counsellor-at-law or have any legal learning whatsoever. The statute provides for counsel and secretary to the Commission (Secs. 6, 7). Doubtless the preparation of all orders was in the hands of the counsel, secretary or clerical force of the Commission. Whether proceeding was wrongly or rightly recited was of no consequence; in fact, if an order had no recitals, it would be just as effective.

Contract No. 1, at pp. 119, 121, 122, expresses the obligation of the Interborough for the rendition of services. Similar provisions are contained in Contract No. 3 (Contract No. 3, Chap. III, Arts. LVIII-LXIX inclusive; Chap. IV, Art. LXX).

These provisions clearly show that most, if not all, of the proceedings, the titles or recitals in which are stressed by the Interborough, as indicating action under the Public Service Commissions Law, were, in fact, proceedings in conformity with the contract provisions. There may be exceptions such as the case of the approval of securities issued by the Interborough Company, covered by §55 of the Public Service Commissions Law. This was one of the

provisions derived from the Railroad Law, applicable to railroad corporations. The Interborough is a railroad corporation and must, of necessity, be such in order to qualify as lessee of the property of Manhattan Railway Company. If any financing had been done by McDonald under Contract No. 1, or Rapid Transit Subway Construction Company, the business corporation, under Contract No. 2, it would not have been within the purview of the Railroad Law, or devolved upon the Public Service Commission.

The position of the Interborough is very weak indeed when it must have recourse to such contention.

The case in 219 N. Y. 355, referred to by the Interborough at p. 74, is decisive of nothing. Both parties assumed there was jurisdiction. It was neither discussed nor decided, the proceeding being dismissed with no relief granted.

The statement at p. 69 of the Interborough's brief, taken from the first annual report of the Public Service Commission, is neither correct nor complete. Doubtful of the propriety of the use of such material, we are nevertheless compelled to correct the Interborough's misleading quotation by setting forth such statement accurately in its entirety.

> "The Public Service Commissions succeeded to the powers of the Railroad Commissioners, the Commission of Gas and Electricity and the State Inspector of Gas Meters. These bodies had jurisdiction over the entire State and ceased to exist upon June 30, 1907. All of their powers and duties within the area of Greater New York were transferred to the Public Service Commission for the First District. Many other functions which had not theretofore been exercised by any State or local authority were conferred upon the

Commission, and thus it came to have the power to control, supervise, and regulate (see section 5 of the Act):

(1) Railroads and street railroads lying exclusively within that district.

(2) Street railroads any portion of whose lines lies within that district, and all transportation thereon.

(3) Such portion of the lines of any other railroad as lies within that district, so far as concerns the construction, maintenance, equipment, terminal facilities, and local transportation facilities, and local transportation of persons or property within that district.

(4) Any common carrier, operating or doing business exclusively within that district.

(5) The manufacture, sale or distribution of gas and electricity for light, heat and power in said district.

The Board of Rapid Transit Railroad Commissioners for New York City, was also abolished by the act, and its powers and duties transferred to the Public Service Commission for the First District. Thus, this Commission has a dual character. Upon the one hand, it has most full and complete powers of regulation over all public service corporations. Upon the other, it has the important task of planning and constructing, possibly also of equipping and operating, rapid transit lines, whether subway or elevated. So far as the transportation problem is concerned, therefore, the Commission has two strings to its bow; it may build subways, as its predecessor did, the Rapid Transit Board; and it may order existing companies to increase their service, adjust fares and freight rates, improve their equipment, etc.—a function which neither the Rapid

Transit Board nor the Railroad Commissioners had to the extent which this Commission now possesses and has been exercising for the past six months."

Appellant's statement of City's policy of not operating for profit fully sustained.

At page 34 of the Interborough's brief it is asserted that the "policy of not operating for profit" is prohibited by express statutory enactment; reference being made to the provisions in the Rapid Transit Act that under municipal operation service must be rendered at cost.

At page 35 of its brief, appellee introduces a contention, based upon Chapter 573 of the Laws of 1924 creating the Board of Transportation in the City of New York, to which Board were transferred all the powers and duties under the Rapid Transit Act, as amended from time to time, except the enforcement of the contract obligations of the Interborough Company. (*See this Appellant's Main Brief, pp.* 117-119.)

The new act modifies the provision in the Rapid Transit Act with relation to rates of fare for *municipal* operation, Under the Rapid Transit Act (Section 30), such fares were required to be adjusted from time to time by the City's own boards, so as to provide service at cost.

The Act of 1924 (Sec. 135) makes an exception to this, in the case of subsequently constructed rapid transit lines, in that in case of *municipal* operation it provides for operation *for the first three years* at a five (5) cent fare, regardless of whether that shall be above or below actual cost. The readjustment to a cost basis follows after such period.

The Transit Commission has nothing whatever to do with the change of any such rates.

These provisions are made pursuant to Article XII, Section 1, of the New York Constitution, requiring the Legislature to restrict the power of taxation and borrowing of municipal corporations and were intended to provide new rapid transit facilities in consonance therewith.

Since the passage of the Act of 1924, the Constitution of the State of New York has been amended by the following provision, effective January 1, 1928:

> "§10-a. Notwithstanding any of the limitations prescribed by the preceding section, debts may be incurred by the City of New York after January first, nineteen hundred and twenty-eight, for the construction or equipment, or both, of new rapid transit railroads not exceeding the sum of three hundred million dollars, and such debts shall not be included in computing the debt limit of such city for the purpose of ascertaining the power of such city to become otherwise indebted" (Article VIII, §10-a).

Under express legislative and judicial authority, the new rapid transit lines now under construction by the City of New York are being financed in such a manner as to give effect to the policy alleged to be "prohibited" and to continue the five (5) cent fare thereon, so that they will in all respects be on a parity with the lines heretofore constructed by the City of New York and under contract for operation by the Interborough Company at a five (5) cent fare.

> *People ex rel. Schieffelin* v. *Walker*, 247 N. Y. 320, 328.

The accuracy of this appellant's position is confirmed by the opinion of Blackmar, J., in *Admiral Realty Company*

v. *City of New York*, 76 Misc. 345, where, at page 353, he said:

> "The city purpose in securing a municipal road is not to make money. Profit may arise incidentally, but the city purpose is to promote the welfare and convenience of its citizens. Herein lies the difference between a private railroad company and a municipal corporation. The one seeks primarily profits for its shareholders, the other the welfare of its citizens. The Interborough Company, *if not driven by fear of competition*, might hold on to its present profitable lease, leaving the east side of Manhattan and the lower west side unserved, and regardless of the needs of the outlying sections of the city. And it is not subject to just criticism for making the interests of its stockholders paramount. But, in pursuit of a city purpose, the city is justified in extending the road, by its branches into the Bronx, Queens and Brooklyn, *although such extension must necessarily be operated at a loss. It is justified in insisting upon a five-cent fare over the whole system*, although that may tend to make the operation unprofitable. *Many considerations, other than profit, move to the city. It secures, by the proposed contract, a five-cent fare over all the system.* It secures two complete subways, one on the east side of Manhattan and one on the west. It gives transit accommodations to its citizens in the outlying portions of the Bronx, Queens and Brooklyn. It secures the right of recaption of a completed system by the provision for the so-called exchange of legs. Being hampered by the debt limit, it secured the loan of $56,000,000 from the Interborough in constructing its subway, to be paid for from the earnings of the road." (Italics ours.)

Judge Blackmar further said (p. 354):

> "In determining whether the proposed contract gives the city's property or lends its credit to the

Interborough, it is essential to consider not merely the distribution of the receipts from operation but other results which the city secures. It may be that a lease of a subway to an operating company might be so baldly in the interests of the lessee that it would constitute giving property. But, if the lease is given in furtherance of a city purpose, it would not necessarily constitute a gift even if the rent reserved were nominal. The accomplishment of a city purpose might be of more value than a money rental. An illustration may be drawn from the ferry situation. Since the Dongan charter, granted in 1686 the city has owned ferry franchises and operated them, usually through lessees. Recently, the ferry to Staten Island has been operated by the city. The result in the year 1910 was a deficiency of $439,-019, without counting the interest on the investment. This money the city paid to secure a proper city purpose. In 1909, the city leased the ferry from the foot of Broadway, Brooklyn, to the foot of East Twenty-third street, New York, with the terminals which the city agreed to acquire, for ten years at a rental of One dollar per annum and an agreement on the part of the lessee to operate the ferry. Here is valuable property rented to a private corporation for a long term at a nominal rental. Yet, this is not giving the property to the corporation in violation of the constitution. A comparison of the terms of this lease with the results of the operation of the Staten Island ferries demonstrates that the agreement to maintain and operate Twenty-third street ferry is a sufficient consideration for the lease. In the one case, the city performs its own city purpose at a cost of over $400,000 per year. In the other, the city secures the result through the agency of a ferry company by leasing it the city's property at a nominal rental. This is an illustration of the proposition that the accomplishment of the city purpose is the

consideration which prevents the lease of the subway being a gift, *even though the financial returns to the city are problematical.*"

On appeal, the Appellate Division in affirming the judgment rendered by Mr. Justice Blackmar, adopted his opinion as the basis of its action.

Admiral Realty Company v. *City of New York*, 151 App. Div. 888.

The Appellate Division judgment was affirmed by the Court of Appeals.

In his comprehensive opinion for affirmance, Judge Hiscock said *in limine* (p. 125):

"The cases were discussed at Special Term by Mr. Justice Blackmar in an elaborate and carefully considered opinion."

Admiral Realty Company v. *City of New York*, 206 N. Y. 110, 115 (quoted in this appellant's main brief, pp. 89, 92).

The Interborough's claim that contract #3 superseded the fare provisions in contracts #1 and #2 avails it nothing.

One of the questions to which the Court of Appeals devoted the most discussion in the *Admiral Realty Company* case was the right of the City to bargain for a modification of an existing contract.

It has already been pointed out in our main brief (pp. 137-138) that the Interborough's claim of such modification is, in fact, groundless; but even if it were otherwise, it is the established law, expressly determined in the *Admiral Realty Company* case, that the parties to such a

contract may bargain for a modification thereof (see our main brief, p. 91).

While the decision in that case related to the modifications embodied in contract #3, the principle established applies to any modification that may be agreed upon between the parties.

Furthermore, ever since 1894, the Rapid Transit Act has contained an express provision authorizing modifications of contracts by agreement of the parties and consent of the sureties of the contractor (Rapid Transit Act, §38, added by Laws 1894, ch. 752, §9, and amended by L. 1895, ch. 519, §13; L. 1906, ch. 472, §9; L. 1909, ch. 498, §18, and L. 1912, ch. 226, §18).

The Rapid Transit Act unquestionably controls the contract embodied in the Elevated Railroad Certificate.

Manhattan Railway Company, as a privately owned railroad is unquestionably subject to the provisions of the Public Service Commissions Law. That does not mean, however, that the Legislature may not authorize it to enter into an inviolable contract with the City of New York.

By §14 of Chapter 752 of the Laws of 1894, no franchise for the construction of a rapid transit railroad for private operation could be granted after the people, on the referendum, required by such act, approved of construction at public expense. This condition existed until Chapter 498, §2 of the Laws of 1909 repealed the referendum requirement (*Admiral Realty Company* v. *City of New York*, 206 N. Y. 110, 141).

By §7 of Chapter 498 of the Laws of 1909, §24 (formerly 32-a) of the Rapid Transit Act, was amended so as to require any "determination, authorization or license" for

the construction of a connecting railroad to "contain a reservation to the City" of the right to terminate by recapture after ten years, upon the payment of costs plus fifteen per cent.

By §3 of Chapter 226 of the Laws of 1912, subdv. 1 of §24 of the Rapid Transit Act was amended so as to authorize connection or extension railroads under an agreement with the City "on the basis of a division of income, earnings or profits," and the "determination, authorization or license" for which connection or extension might provide that

> *"the gross or net receipts derived from the operation of such railroad owned, operated or to be operated by the said person, firm or corporation within the limits of said city, and from the operation of such connecting or extending route or routes, additional track or tracks or facilities may be combined, and that the city may receive as such compensation at intervals named a specified part or proportion of the income, earnings or profits of the railroad, and the route or routes, additional track or tracks or facilities whose receipts are so combined or of those and any other railroads which may be operated in connection therewith in like manner, which part or proportion may be deferred to a previous distribution to said person, firm or corporation, which distribution may be cumulative, and in such case such determination, authorization or license may apportion out of the amount so to be received by the city and shall specify a portion thereof which shall be deemed to be the rental for the use of such route or routes, additional track or tracks or facilities, and shall also provide for determining the amount of the income, earnings or profits of the railroad within the limits of the city and of the route or routes,*

additional track or tracks or facilities whose receipts are so combined and may provide for readjustment of the proportion which the city shall receive or of the portion thereof which shall be deemed to be the rental for the use of said route or routes, additional track or tracks or facilities at specified intervals, and may prescribe a method of determining by arbitration or by the court the amount which the city shall receive as its proportion of such income, earnings or profits or as such rental upon any such readjustment thereof."

Subdivision 2 of §24 of the Rapid Transit Act, as amended by Chapter 498 of the Laws of 1909 provided that the Commission (exercising the powers under the Rapid Transit Act as successor to the Board of Rapid Transit Railroad Commissioners), should prepare a certificate of the action taken, to be accepted by the Railway Company, and filed in certain public offices (subdv. 3).

Subdivision 4 provided that such certificate

> "when delivered and accepted by such person, firm or corporation shall be deemed to constitute a contract between the said City and said person, firm or corporation according to the terms of the said certificate."

Subdivision 6 of §24 was amended by Chapter 226 of the Laws of 1912 along with subdivision 1; but no change was made in the intervening subdivisions "3", "4" and "5". The material parts of §24 are printed in this appellant's main brief at pp. 171, 173.

It clearly appears that by such action the Legislature under the Rapid Transit Act, by provisions enacted in 1909 and 1912, expressly authorized the making of an agreement between this railroad and/or its lessee the Inter-

borough Company and the City of New York; and it is pursuant to such statutes that the elevated certificate involved herein was granted in connection with the joint trackage agreements, by which Manhattan Railway cars are operated over the City's new subway lines without payment. The certificate so accepted contains a provision for a five (5) cent fare.

Having had the benefits of this agreement for fifteen years, it is somewhat late for the Interborough Company and Manhattan Railway Company to attempt to repudiate the authority of the City to make such an agreement. However, the precise agreement was expressly authorized by amendments made to §24 of the Rapid Transit Act by Chapter 226 of the Laws of 1912.

Being under no obligation to enter into such agreement, but desirous of furthering its great purpose of distribution of population, the City agreed that the territories tributary to its new lines might be tapped by granting Interborough Rapid Transit Company, and its lessor, Manhattan Railway Company, access thereto, over the extensions and connecting railroad authorized by the certificate, and, as a part of the consideration for the five (5) cent fare provision, exacted no payment from the Interborough or its lessor, other than the possibility (still in the remote future) of sharing in the profits that might arise after subordinating the City's own rights to such participation to all of the preferentials and prior charges specified in the certificate under the amendment above quoted, made to subdivision 1 by Chapter 226 of the Laws of 1912, five years after the Public Service Commission Law was enacted.

The five (5) cent fare provision in the certificate is easily understood. The City's own lines were to be oper-

ated for it on that basis by Interborough Rapid Transit Company. If on Manhattan Railway trains a higher fare were charged, no patronage would be obtained.

The Interborough and its lessor desired the new business on such basis and gladly contracted therefor.

The eighty-five year provision now complained of was inserted at their instance (R. 562). It is, however, subject to termination by recapture.

Prior to the amendments of the Rapid Transit Act, made by Chapter 498 of the Laws of 1909, such a certificate could not be granted for a longer period than twenty-five years, with a right of renewal of not to exceed twenty-five years. By the amendments of 1909, this limitation was stricken out and the life of the certificate made indeterminate, but subject to a recapture by the City at any time after ten years, on the payment of actual cost plus fifteen per cent. This provision was retained in the amendment made by Chapter 226 of the Laws of 1912 and extended to apply to

> "any specified portion or portions of such route or routes, additional track or tracks or facilities."

The other phases of this matter have been sufficiently covered in this appellant's main brief (Point VIII, pp. 169-184).

The contentions now presented by the Interborough Rapid Transit Company and Manhattan Railway Company, are wholly without merit.

Privately owned rapid transit railroads.

Reference is made to subdivision 8 of §49 of the Public Service Commission Law in relation to joint rates, through routes or transfers between any "rapid transit railroad and any other rapid transit railroad", etc.

This does not import any relation whatever to the City's subways or contracts for their operation. Besides the rapid transit railroads owned by the City of New York, there exist within the City the lines of Manhattan Railway Company and numerous elevated roads in Brooklyn, all privately owned.

Case overruled.

The decision in *People ex rel. Bridge Operating Company* v. *Public Service Commission*, 153 App. Div. 129 (discussed at pp. 57-58 of Interborough brief), was never taken to the Court of Appeals. It was overruled (not expressly, but necessarily), by the Court of Appeals in *City of New York* v. *Brooklyn City Railroad Company*, 232 N. Y. 463; in which case it was held that the City's rights in relation to the street railway on the Williamsburg Bridge were derived from the Legislature, and that the Public Service Commission "may not veto a statute". The case involved a mere license.

The Appendices:

The Interborough Company has printed an appendix of 268 pages, which is alleged to contain "pertinent parts" of the Public Service Commissions Law, Rapid Transit Act, and other statutes, contracts, decisions of the New York Court of Appeals, and other data.

We have already pointed out (*supra*, p. 22) some instances of most significant omissions from such appendix of controlling parts of the Rapid Transit Act.

If such appendix be intended to serve as a compendium of the statutes, it is wholly inadequate.

The "pertinent parts" actually included in such appendix are so disassociated from related and controlling

provisions of the statutes as not only to be of no value as an aid to the Court, but are a serious detriment to the consideration of the appellant's case.

So far as the general statutes of the State of New York, embraced for the most part in the "Consolidated Laws", are concerned, we assume they are in the library of the Court.

The Rapid Transit Act, however, is a *special* statute, not included in the Consolidated Laws.

Between 1891 and 1909 it was amended on a great many occasions. The sections in such Act are of great length. There is no official report or publication that embraces all of such amendments; and the physical task of examining them in the Session Laws from year to year is so onerous as to be entirely out of the question.

The Rapid Transit Act was revised generally, however, by chapter 498 of the Laws of 1909. There were four amendments in 1910, and one in 1911.

With these exceptions, chapter 498 of the laws of 1909 in legislative bill form, and chapter 226 of the laws of 1912 (Wagner bill) in legislative bill form, present in summary and easily understood form the provisions of the Rapid Transit Act as it stood at the time of the execution of contract No. 3 and the elevated railroad certificates.

In the "Appendix to Reply Brief for the Appellant, The City of New York", we have printed in full, in legislative form, the acts of 1909 and 1912; with footnotes explaining the amendments in 1910 and 1911, only one of which is of present materiality.

POINT II.

Contemporaneous history reveals no fact in aid of Appellee's assumptions.

In view of the claims now asserted by the Interborough, is it not most extraordinary that there has not been produced from any discussion or proceeding before any legislative committee, or from the debates in either the Senate or Assembly of the State of New York, or from any public paper, message or communication of the Governor, or from any petition, memorial or other action of any public board or body, such as the Board of Rapid Transit Railroad Commissioners, or the Board of Estimate and Apportionment of the City of New York, or from any private interest, such as the Interborough Rapid Transit Company, a single word or line to indicate that there was under consideration by the Legislature in the enactment of the Public Service Commissions Law any such change or effect as twenty-one years after its passage has been asserted for it by the Interborough Company?

Surely, somewhere, and at some time, a change so momentous would have been discovered or left its trace.

LASTLY.

The Court should not needlessly disappoint the just expectations of the people of New York City, nor arrest the progress made in thirty-five years' effort to attain transit facilities adequate for their daily use.

Since the Rapid Transit Act was first enacted, it has been amended approximately thirty times by the New York Legislature, such amendments, in each instance, being to enlarge the power of the City of New York to provide rapid

transit facilities for its ever-increasing and congested population. The Constitution of the State has several times been amended to the same end. As recently as November, 1927, the people of the State of New York approved of an amendment to the Constitution to empower the City of New York to use its credit to the extent of $300,000,000 for the provision of new rapid transit facilities, without regard to any limitations theretofore existing on the City's debt incurring power.

The action of the people in approving the various constitutional amendments and of the Legislature in enlarging the powers of the City under the Rapid Transit Act, has all been taken in the light of the well understood and established policy of the City of New York.

Since 1891, the Legislature has never passed a single act to diminish or restrict the power of the City of New York to accomplish its great City purpose.

If, as the Interborough Company claims, the City is without power to contract for the operation of its rapid transit railroads, constructed and in process of construction, it is indeed in a distressing plight.

The order appealed from should be reversed and the application denied with costs.

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JOSEPH A. DEVERY,
EDGAR J. KOHLER,
Of Counsel.

January 9, 1929.

JAN 9 1929
CHARLES ELMORE CROPLEY
CLERK

Supreme Court of the United States

OCTOBER TERM, 1928.

No. 159.

JOHN F. GILCHRIST, LEON G. GODLEY, and CHARLES C. LOCKWOOD, constituting the TRANSIT COMMISSION, etc., and THE CITY OF NEW YORK,

Appellants,

vs.

INTERBOROUGH RAPID TRANSIT COMPANY AND MANHATTAN RAILWAY COMPANY.

APPENDIX TO REPLY BRIEF FOR THE APPELLANT, THE CITY OF NEW YORK.

Containing in legislative bill form chapter 498 of the laws of 1909, and chapter 226 of the laws of 1912, each amending the rapid transit act generally.

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The City of New York.

CHARLES L. CRAIG,
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Of Counsel.

January 9, 1929.

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(The Section Numbers refer to the Rapid Transit Act and not the Amendatory Act.)

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EXPLANATORY NOTE:

The Rapid Transit Act between 1891 and 1909 was amended on a great many occasions. The sections in such Act are of great length. There is no official report or publication that embraces all of such amendments; and the physical task of examining them in the Session Laws from year to year is so onerous as to be entirely out of the question.

The Rapid Transit Act was revised generally, however, by chapter 498 of the Laws of 1909, and by Chapter 226 of the Laws of 1912. There were four other amendments in 1910, and one in 1911, which are explained in a note at p. 170.

With these exceptions, chapter 498 of the laws of 1909 in legislative bill form, and chapter 226 of the laws of 1912 (Wagner bill) in legislative bill form, present in summary and easily understood form the provisions of the Rapid Transit Act as it stood at the time of the execution of contract No. 3 and the elevated railroad certificates.

Became a law with the approval of the Governor as Chapter 498 of the Laws of 1909.

State of New York.

No. 2310. Int. 1725.

IN ASSEMBLY,

April 19, 1909.

Introduced by Mr. ROBINSON—read once and referred to the Committee on Affairs of Cities.

AN ACT

To amend chapter four of the laws of eighteen hundred and ninety-one, entitled "An act to provide for rapid transit railways in cities of over one million inhabitants," generally.

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

Section 1. Sections four, five and six of chapter four of the laws of eighteen hundred and ninety-one, entitled "An act to provide for rapid transit railways in cities of over one million inhabitants," as heretofore amended, are hereby further amended to read as follows:

§ 4. *Public service commission to determine necessity for railroads; routes; plan; consents; parks and streets excepted.* The [said board] *public service commission of the first district* upon its own motion may proceed, from time to time, to consider and determine whether it is for the interest of the public and of [the city in which it is appointed,] *a city having over one million of*

EXPLANATION—Matter *in italics* is new; matter in brackets [ ] is old law to be omitted.

place and Lefferts place, Lee avenue, Nostrand avenue, Waverly avenue, Vanderbilt avenue and Clinton avenue in said [city] *borough* of Brooklyn, nor that portion of the city of Buffalo lying between Michigan and Main streets, nor any part of Fifth avenue, in the *borough of Manhattan*, city of New York, nor that portion of any street or avenue which is now actually occupied by any elevated railroad structure, shall be occupied by any corporation [to be organized under the provisions of this act] for the purpose of constructing a [railway] *railroad* in or upon any of such public parks, lands or places, or upon or along either of the said excepted streets or avenues. It shall be lawful for said commissioners to locate the route of a [railway] *railroad* or [railways] *railroads* by tunnel under any such public parks, lands, places, rivers or waters and to locate the route of any [railway] *railroad* to be built, under this act, across any of the streets and avenues now occupied by an elevated railroad structure in the city of New York, or across any of the streets or avenues excepted in this act at any point at which, in its discretion, the [board of rapid transit railroad commissioners] *public service commission* may deem necessary in the location of any route or routes, or under, or under and along, any of said streets or avenues now so occupied or so excepted in this act. Nothing in this act shall authorize the construction of an elevated [railway] *railroad* on Broadway south of Thirty-third street, nor on Madison avenue in the *borough of Manhattan*, city of New York. It shall not be lawful to grant, use or occupy, for the purposes of

an elevated railroad, except for the purpose of crossing the same, any portion of the following named streets and places in the *borough of Manhattan*, city of New York, that is to say: Second avenue, below Twenty-third street; Fourteenth street, between the easterly line or side of Seventh avenue, and the westerly side of Fourth avenue; nor Eleventh street, west of Seventh avenue, nor any part of Bank street; Nassau street; Printing House square, so called, south of Franklin street; Park row, south of Tryon row; Broad street and Wall street.

(2) The provisions of the said section four of the said act shall, with reference to any rapid transit railroad for which routes and a general plan have been heretofore adopted by the board of rapid transit railroad commissioners of any city, and for the municipal construction of which a contract has been heretofore made by any city, be deemed to have been in full force as hereby amended from before the time when the routes and general plan for such railroad or railroads were so adopted by the board of rapid transit railroad commissioners.

§ 5. *Approval and consent of board of estimate and apportionment, or other board; consent of local authorities. 1.* After any determination by [said board] *the public service commission* of any such route or routes and of any general plan of construction of said [railway] *railroad* or [railways] *railroads*, the [said board] *commission* shall transmit to the board of estimate and apportionment or other board or boards of said city having the

place and Lefferts place, Lee avenue, Nostrand avenue, Waverly avenue, Vanderbilt avenue and Clinton avenue in said [city] *borough* of Brooklyn, nor that portion of the city of Buffalo lying between Michigan and Main streets, nor any part of Fifth avenue, in the *borough of Manhattan*, city of New York, nor that portion of any street or avenue which is now actually occupied by any elevated railroad structure, shall be occupied by any corporation [to be organized under the provisions of this act] for the purpose of constructing a [railway] *railroad* in or upon any of such public parks, lands or places, or upon or along either of the said excepted streets or avenues. It shall be lawful for said commissioners to locate the route of a [railway] *railroad* or [railways] *railroads* by tunnel under any such public parks, lands, places, rivers or waters and to locate the route of any [railway] *railroad* to be built, under this act, across any of the streets and avenues now occupied by an elevated railroad structure in the city of New York, or across any of the streets or avenues excepted in this act at any point at which, in its discretion, the [board of rapid transit railroad commissioners] *public service commission* may deem necessary in the location of any route or routes, or under, or under and along, any of said streets or avenues now so occupied or so excepted in this act. Nothing in this act shall authorize the construction of an elevated [railway] *railroad* on Broadway south of Thirty-third street, nor on Madison avenue in the *borough of Manhattan*, city of New York. It shall not be lawful to grant, use or occupy, for the purposes of

an elevated railroad, except for the purpose of crossing the same, any portion of the following named streets and places in the *borough of Manhattan*, city of New York, that is to say: Second avenue, below Twenty-third street; Fourteenth street, between the easterly line or side of Seventh avenue, and the westerly side of Fourth avenue; nor Eleventh street, west of Seventh avenue, nor any part of Bank street; Nassau street; Printing House square, so called, south of Franklin street; Park row, south of Tryon row; Broad street and Wall street.

(2) The provisions of the said section four of the said act shall, with reference to any rapid transit railroad for which routes and a general plan have been heretofore adopted by the board of rapid transit railroad commissioners of any city, and for the municipal construction of which a contract has been heretofore made by any city, be deemed to have been in full force as hereby amended from before the time when the routes and general plan for such railroad or railroads were so adopted by the board of rapid transit railroad commissioners.

§ 5. *Approval and consent of board of estimate and apportionment, or other board; consent of local authorities.* 1. After any determination by [said board] *the public service commission* of any such route or routes and of any general plan of construction of said [railway] *railroad* or [railways] *railroads*, the [said board] *commission* shall transmit to the board of estimate and apportionment or other board or boards of said city having the

control of any street, highway, boulevard, driveway, bridge, tunnel, park, parkway, dock, bulkhead, wharf, pier or public grounds or water which is within or belongs to the city, a copy of said plans and conclusions as adopted. It shall be the duty of such board of estimate and apportionment and of every other such board or boards having such control, upon receiving such copy of plans and conclusions, to appoint a day not less than one week nor more than ten days after the receipt thereof for the consideration of such plans and conclusions, and the said board of estimate and apportionment and every other such board or boards having such control shall, on the day so fixed, proceed with the consideration thereof and may continue and adjourn such consideration, from time to time, until a final vote shall be taken thereon, as hereinafter provided. Within sixty days after the copy of such plans and conclusions adopted by the [board of rapid transit railroad commissioners] *commission* shall have first been received by said board of estimate and apportionment or such other board or boards having such control, a final vote shall be taken thereon, by ayes and nays, according to the number of votes by law pertaining to each member of any such board in the form of a vote upon a resolution to approve such plans and conclusions and to consent to the construction of a [railway] *railroad* or [railways] *railroads* in accordance therewith.

2. Upon the adoption of such a resolution by a majority vote of all the members of the said board of estimate and apportionment or other such board or boards having such control, accord-

ing to the number of votes by law pertaining to each member of any such board and the approval of the mayor, the said plans and conclusions shall be deemed to have been finally consented to and adopted, and such consent shall be deemed to be the consent of the local authorities of such city; provided, that where in any such city the exclusive control of any street, road, bridge, viaduct, highway or avenue which is to be used or occupied by any [railway] *railroad* or [railways] *railroads* constructed under the provisions of this act, is by law vested in any local authority other than the board of estimate and apportionment of such city, the approval of the aforesaid plans and conclusions and the consent to the construction of a [railway] *railroad* thereunder shall be given by such local authority in place of and, if required, in addition to such approval and consent by said board of estimate and apportionment and with like effect.

3. Upon obtaining the approval and consent of the local authorities as above provided the [said board of rapid transit railroad commissioners.] *public service commission* shall also, unless such approval and consent of local authorities shall have been refused, take the necessary steps to obtain, if possible, the said consents of the property owners along the line of the said route or routes. For the purposes of this act the value of the property bounded on that portion of any street or highway in, upon, over or under which it is proposed to construct or operate such [railway] *railroad* or [railways] *railroads*, or any part thereof, shall be ascertained and determined from the assessment-

roll of the city in which the said property is situated, confirmed or completed last before the local authorities shall have given their consent, as above provided. If such consents of property owners can not be obtained, the [said board] *commission* may, in its own name, make application to the appellate division of the supreme court in the [judicial district] *department* in which such [railway] *railroad* is to be constructed for the appointment of three commissioners to determine and report after due hearing whether such [railway] *railroad* ought to be constructed and operated. *Three* [Two] weeks' notice of such application shall be given by [daily] publication thereof *once in each week* [, Sundays and holidays excepted,] in [six] *two* daily newspapers published in the city where such proposed railroad is to be constructed, if there be so many newspapers published in said city, and if not, then in all the daily newspapers published in said city. The newspapers in which said publication shall be made shall be designated by the appellate division of the supreme court to which such application is to be made on the application of the commission without notice.

4. the said appellate division upon due proof of the publication aforesaid, shall appoint three disinterested persons who shall act as commissioners, and such commissioners within ten days after their appointment shall cause public notice to be given in the manner directed by the said appellate division of their first sitting, and may adjourn from time to time until all their business is completed. Vacancies in such commission may be filled by said

appellate division after such notice to persons interested as the appellate division may deem proper, and the evidence taken before as well as after such vacancy occurred shall be deemed to be property before such commissioners. The said commissioners shall determine after public hearing of all parties interested whether such railroad ought to be constructed and operated and shall report the evidence taken to said appellate division, together with a report of their determination whether such road ought to be constructed and operated, which report, if in favor of the construction and operation of such road, shall, when confirmed by said court, be taken in lieu of the consent of the property owners above mentioned. Such report shall be made within sixty days after the appointment of said commissioners, unless the said court, or a judge thereof, shall extend such time.

5. The board of estimate and apportionment of the city of New York shall, with respect to that city, be hereafter for all purposes of this act and be deemed to be the local authority in control of the streets, roads, bridges, viaducts, highways, avenues, boulevards, driveways, parks, parkways, docks, bulkheads, wharfs, piers and public grounds and waters which are within or belong to the said city; and the consent of such board of estimate and apportionment and the mayor, without the consent of the common council, board of alderman or other board or officer of the city, shall be the only consent of local authorities required hereunder.

§ 6. *Detail plans; tunnels for pipes and wires; work affect-*

ing sewers and other sub-surface structures.—1. When th consents of the local authorities and the property owners, o in lieu thereof, the authorization of the said appellate division the supreme court upon the report of commissioners, shall hav been obtained, the [board of rapid transit railroad commissio ers] *public service commission* shall at once proceed to prepar detailed plans and specifications for the construction of such rapi transit [railway] *railroad* or [railways] *railroads* in accordanc with the general plan of construction, including all devices an appurtenances deemed by it necessary to secure the greatest e ficiency, public convenience and safety, including the numbe location and description of stations and plans and specificatio for the suitable supports, turnouts, switches, sidings, conne tions, landing places, buildings, platforms, stairways, elevator telegraph and signal devices, and other suitable appliances inc dental and requisite to what the [said board] *commission* ma approve as the best and most efficient system of rapid transit i view of the public needs and requirements, and the [said board] *commission* may, in its discretion, include in said plans provisio for galleries, ways, subways or tunnels for sewers, gas or wate pipes, electric wires and other sub-surface structures and co ductors proper to be placed underground, whenever necessary s to do, in order to permit of the proper construction of any [rai way]*railroad* herein provided for in accordance with the plan and specifications of the [said] board *of rapid transit railroa*

commissioners or of the commission, or for any other purpose in furtherance of the public interest or convenience.

2. Stations and station approaches may be under or over streets of the route or cross streets, and the board of aldermen, or other legislative body, of any such city shall have power to regulate by general or special ordinance or resolution, the erection, alteration and maintenance upon or in connection with any building used, wholly or in part, for station purposes, or approaches, or any and all structures or parts of structures extending over the whole or any part of any sidewalk or sidewalks adjacent thereto. The [board] *commission* may, from time to time, alter such detailed plans and specifications, but always so that the same shall accord with the general plan of construction; but whenever a contract shall have been made for the construction of any [railway] *railroad* herein provided for, no such alteration shall be made by the [board] *commission* without the consent of the contractor and his sureties, except as liberty shall have been reserved in such contract by said board *of rapid transit railroad commissioners or by the commission* for such alteration.

3. Whenever the construction of any [railway,] *railroad*, depressed way, subway or tunnel under the provisions of this act shall interfere with, disturb or endanger any sewer, waterpipe, gaspipe, or other duly authorized sub-surface structure, the work of construction at such points shall be conducted [in the city of New York] in accordance with the reasonable requirements [of the commissioner of public works, and in other cities in accord-

ance with the reasonable requirements and under the supervision
of the officer or local authority having the care of and the juris
diction or control over such sub-surface structures so interfered
with, disturbed or endangered. [All expenses incidental to such
supervision and to the work of reconstructing, readjusting and
supporting any such sewer, waterpipe, gaspipe, or other duly
authorized sub-surface structure shall be borne and paid by the
company which shall have acquired the right, privilege and fran-
chise to construct, maintain and operate such railway, pursuant to
a sale of the same at public auction, as hereinafter provided, if
any such sale shall be made by said board.]

4. Where under the direction of the [said board] *commission*
or in pursuance of any general plan adopted or of any contract
made by the said board *or the commission*, galleries, ways, sub-
ways or tunnels shall be constructed to contain sewers, pipes or
other sub-surface structures, the said galleries, ways, subways or
tunnels shall be maintained by the said city and shall be in the
care and charge of the [said board] *commission* and subject to
such regulations as it shall prescribe not inconsistent with the
provisions of this act, and any revenue derived therefrom shall be
paid into the treasury of said city, except that where bonds shall
have been issued to provide for the cost of construction or equip-
ment of such railroads, such amounts shall be paid [to] *into* the
sinking fund of the city, if there be one, or if not then into the
sinking fund to be established and created out of the annual rentals
of said road, as provided in section thirty-seven of this act

Provided, however, that any person or corporation who or which at the time of the construction of the said galleries, ways, subways, or tunnels shall own pipes, subways or conduits in a street, avenue or public place in which said galleries, ways, subways or tunnels shall be constructed pursuant to this act, shall be entitled to the use of such galleries, ways, subways or tunnels for his or its said pipes, subways or conduits in the same manner as the said person or corporation shall be entitled by law to the use of such street, avenue or public place, and that no rent shall be charged for such use, except a reasonable charge to defray the actual cost of maintenance, unless such pipes, subways or conduits shall be of greater capacity than those theretofore owned by such person or corporation in said street, avenue or public place, and that, if the capacity of any such pipe, subway or conduit, so placed in the said galleries, ways, subways or tunnels shall be increased, the rent shall be charged only for such increased capacity; and provided further, that the placing in any such galleries, ways, subways or tunnels of the subways or conduits of any corporation owning subways or conduits for electrical conductors, shall not in any wise affect the right of such corporation to charge and demand such compensation or rent for the use of said subways or conduits by other corporations or individuals as is, or may be, permitted by law.

5. Nothing in this section or contained in the act hereby amended shall be construed as granting, enlarging, changing, or in any manner validating any right, privilege or franchise, or any

claimed or alleged right, privilege or franchise, to maintain, ope
ate, or possess any gas mains, pipes or conductors, or any co
duits or conductors for transmission of electricity, or any sub-s
face structures of any name or nature whatever, in any street, a
nue, highway or public place in such city.

§ 2. Sections seven, eight, eleven, twelve, thirteen, fourte
fifteen, sixteen, seventeen, eighteen, nineteen, twenty, twenty-o
twenty-two, twenty-five, twenty-six, twenty-seven, twenty-eig
twenty-nine, thirty, thirty-one and thirty-eight-a of said act
hereby repealed.

§ 3. Chapter three hundred and sixty-seven of the laws of ei
teen hundred and ninety-two is hereby repealed.

§ 4. Sections nine, ten, twenty-three and twenty-four of
chapter four of the laws of eighteen hundred and ninety-one,
heretofore amended, are hereby further amended to read as follo

§ 9. *Offices and assistants for commission; actions by commis*

1. The said [board] *commission* may rent such offices and emp
such engineers, attorneys and other persons, from time to time
it may, in its discretion, deem necessary to the proper perform
by it of its duties as in this act prescribed. It may sue in
name and behalf of the city for which it acts as a [board]
mission. It may in the name of and in behalf of the said
bring action of specific performance or may apply by manda
to compel the performance within [its] said city by any corp
tion or person of any duty or obligation with reference to or
ing out of the construction or operation of any railroad und

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by reason of, any grant made or right acquired under this act or the acts amendatory hereof or supplementary hereto, or out of or by reason of any contract made or authorized by any board of rapid transit railroad commissioners within its city *or the public service commission*, or it may in behalf of and in the name of said city bring actions to recover damages for any violation of contract or duty, or for any wrong committed by any such corporation or person by reason of any non-performance or violation of duty under the provisions of this act or under any contract or stipulation made in pursuance of any provisions of this act.

2. Every action or proceeding brought by the [said board] *commission*, and every action or proceeding in which an injunction is had or sought against the [board] *commission* or the said city, or against any corporation or person who or which shall have entered into a contract under the provisions of this act, or any act supplementary hereto, or amendatory hereof, by reason of any act or thing done, proposed or threatened under or by virtue of any provision of this act, or any act supplementary hereto, or amendatory hereof, or is sought against any corporation or person claiming or claiming to act under any grant or franchise under this act, or any act supplementary hereto, or amendatory hereof, and every action or proceeding in which the constitutionality of any part of this act, or of any act supplementary hereto, or amendatory hereof, shall or may be brought in question, shall have a preference above all causes not criminal on the calendar of every court, and

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may be brought on for trial or argument upon notice of eight day
for any day of any term on which the court shall be in session.

§ 10. *Appropriation for commission; audit and payment of e*
penditures; bonds.—The board of estimate and apportionme
or other board or public body on which is imposed the dut
and in which is vested the power, of making appropriatio
of public moneys for the purposes of the city governme
in any city in which it is proposed to construct such [rai
way] *railroad* or [railways] *railroads* shall, from time to tim
on requisition duly made by the [board of rapid transit rai
road commissioners] *public service commission*, appropriate suc
sum or sums of money as may be requisite and necessary t
properly enable it to do and perform, or cause to be done and pe
formed, the duties herein prescribed, [and to provide for the com
pensation of such commissioners,] and such appropriation shall b
made forthwith upon presentation of a requisition from th
[board of rapid transit railroad commissioners] *public servi*
commission, which shall state the purposes for which such mone
are required by the [said board] *commission*. In case the sa
board of estimate and apportionment or such other board or publ
body fail to appropriate such amount as the [board of rap
transit railroad commissioners] *public service commission* dee
requisite and necessary, the [said board of rapid transit railro
commissioners] *commission* may apply to the [general term] a
pellate division of the supreme court, in the department in whi
the [railway] *railroad* is to be or has been constructed, on notice

the board of estimate and apportionment, or such other board or public body aforesaid, to determine what amount shall be appropriated for the purposes required by this section, and the decision of said [general term] *appellate division* shall be final and conclusive; and no city shall be liable for any indebtedness incurred by the [said board of rapid transit railroad commissioners] *commission* in excess of such appropriation or appropriations. It shall be the duty of the auditor and comptroller of any such city, after such appropriations shall have been duly made, to audit and pay the proper expenditures [and compensation] of said commission[ers] upon vouchers therefor, to be furnished by the said commission[ers], which payments shall be made in like manner as payments are now made by the auditor, comptroller, or other public officers, of claims against and demands upon such city; and for the purpose of providing funds with which to pay the said sums, the comptroller or other chief financial officer of said city is hereby authorized and directed to issue and sell revenue bonds of such city in anticipation of receipt of taxes, and out of the proceeds of such bonds to make the payments in this section required to be made. The amount necessary to pay the principal and interest of such bonds shall be included in the estimates of moneys necessary to be raised by taxation to carry on the business of said city, and shall be made a part of the tax levy for the year next following the year in which such appropriations are made. [All expenses of the said board of rapid transit railroad commissioners, including the com-

pensation of said commissioners, so incurred and paid by any city as in this section provided, and for which any city shall be liable, shall be repaid with interest, by the bidder or bidders at the public sale of the rights, privileges and franchises, as in this act provided, in case said board shall so sell the same, whose bid shall be accepted by the board of rapid transit railroad commissioners, and the terms of such sale shall specify the time when such payment shall be made, as well as the amount thereof. The commissioners, other than the mayor and comptroller or other chief financial officer of such city, shall be paid a reasonable compensation for the duties performed by them, from time to time, under the provisions of this act. The amount of such compensation shall be determined by the general term of the supreme court in the department in which said city shall be located upon application by said board after notice to the mayor of such city.]

§ [23] *20. Real estate; proceedings to acquire title.*—Every [such] corporation *which shall have taken or shall take or hold any franchise or contract to construct, maintain and operate a railroad under the provisions of this act* shall have the right to acquire and hold such real estate or easement or other interest therein, or rights appurtenant thereto, as may be necessary to enable it to construct, maintain and operate the said [railway] *railroad* or [railways] *railroads* and such as may be necessary for stations, depots, engine houses, car houses, machine shops and other appurtenances [specified in the articles of association]; and in case any such corporation cannot agree with the owner or owners of such prop

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erty it shall have the right to acquire title to the same in pursuance of the terms and in the manner prescribed in title one of chapter twenty-three of the code of civil procedure known as the condemnation law.

§ [24] *21. Corporate powers.*—Every *such* corporation [formed under this act] shall have power:

1. To take and hold such voluntary grants of real estate and other property as shall be made to it, to aid in the construction, maintenance and accommodation of its [railway] *railroad* or [railways,] *railroads,* but the real estate received by voluntary grant shall be held and used for the purposes of such grant only.

2. To purchase, lease, hold and use all such real estate and other property as may be necessary for the construction and maintenance of its [railway] *railroad* or [railways,] *railroads,* and the stations or other accommodations necessary to accomplish the objects of its incorporation [; but nothing herein contained shall be held as repealing or in any way affecting the act, entitled "An act authorizing the construction of railroads upon Indian lands," passed May twelve, eighteen hundred and thirty-six].

3. To cross, intersect, join and unite its [railway] *railroad* or [railways] *railroads* with any other [railway] *railroad* at any point on its route and upon the grounds of such other [railway] *railroad* company, with the necessary turnouts, sidings and switches and other conveniences in furtherance of the objects of its connections. [And every corporation whose railway is or shall be hereafter intersected by any new railway, shall unite

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with the owners of such new railway in forming such intersections and connections, and grant the facilities aforesaid, and if the two corporations can not agree upon the amount of compensation to be made therefor, the same shall be ascertained and determined by commissioners to be appointed by the court, in the manner provided in this act in respect to acquiring title to real estate. And if the two corporations can not agree upon the points and manner of such crossings and connections, the board of rapid transit railroad commissioners shall determine the same on the application of either corporation.]

4. To take and convey persons and property on its railroad or railroads by the power or force of [steam, or by any motor other than animal power] *electricity or compressed air so used as to involve no combustion or impurity of air in tunnels or cars or any other power of like description approved by the commission*, and to receive compensation therefor [not inconsistent with the provisions of this act, and the terms of sale under which the said corporation shall have acquired its rights, privileges and franchises].

5. To enter upon and underneath the several streets, avenues, public places and lands designated by the said board of rapid transit railroad commissioners *or the public service commission*, and enter into and upon the soil of the same; to construct, maintain, operate and use, in accordance with the plan adopted by said board *or* commission, a [railway] *railroad* or [railways] *railroads* upon the route or routes and to the points decided upon

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and to secure the necessary foundations and erect the columns, piers and other structures which may be required to secure safety and stability in the construction and maintenance of the [railways] *railroads* constructed upon the plan adopted by the said board *or commission*, and which may be necessary for operating the same, except that nothing in this act shall authorize the construction of a [railway] *railroad* crossing the track of any steam [railway] *railroad* in actual operation at the grade thereof, and it shall be lawful to make such excavations and openings along the route through which such [railway] *railroad* or [railways] *railroads* shall be constructed as shall be necessary from time to time; in all cases the surface of said streets around such foundations, piers and columns shall be restored to the condition in which they were before such excavations were made, as near as may be, and under the direction of the proper local authorities; and in all cases the use of the streets, avenues, places and lands designated by the said board *or* commission, and the right of way through the same, for the purpose of a [railway] *railroad* or [railways,] *railroads*, as herein authorized and provided, shall be considered, and is hereby declared, to be a public use, consistent with the uses for which the roads, streets, avenues and public places are publicly held; but no such corporation shall have the right to acquire the use or occupancy of public parks or squares in such county, or the use or occupancy of any of the streets or avenues, except such as may have been designated for

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the route or routes of such [railway,] *railroad*, and except such temporary privileges as the proper authorities may grant to such corporations to facilitate such construction.

[6. From time to time to borrow such sums of money as may be necessary for completing and furnishing or operating their railroad, and to issue and dispose of their bonds for such purposes; but the amount of such bonds outstanding at any one time shall not exceed the amount limited by the articles of association.]

§ 5. Said act is hereby further amended by inserting therein a new section to be known as section twenty-two, which shall read as follows:

§ *22. Private construction; franchise to contruct, maintain and operate.— 1. If or when the necessary consents have been obtained and the detailed plans and specifications have been prepared, either by the board of rapid transit railroad commissioners or by the commission, for the said rapid transit railroad, the commission may with the approval of the board of estimate and apportionment or other analogous authority of such city, grant a franchise to construct, maintain and operate such railroad for the transportation of passengers and property for compensation. The commission shall have power to prescribe all such terms and conditions of such grant and to require such security to be given and filed for the keeping and performance of such terms and conditions as it may deem to be for the interest of the public and of the city and may provide that in connection with the construction of such railroad by the grantee at its own expense any galleries*

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ways, subways or tunnels for subsurface structures which may be included in any such plans shall be also constructed by the grantee at the public expense, and in such case the sum or sums to be paid therefor shall be separately stated and the amount appropriated and paid out of the funds hereafter authorized to be provided in case of such construction, and the commission may provide separately for the maintenance, supervision, care and operation of the same as hereinafter authorized under the provisions of section twenty-seven.

2. The grant shall provide that such railroad shall be constructed by and at the expense of the grantee under the direction and supervision of the commission and in accordance with such detailed plans and specifications; that the construction shall be begun within a time to be specified and shall be finished within a specified time thereafter; and that operation of said railroad shall be begun within a specified time, and may fix the time within which portions of the said railroad shall be begun and finished and put in operation, and may provide that the commission may extend the time of beginning, of completion and of operation of such railroad or portion thereof, and that if the grantee shall fail to begin or to finish the construction or begin the operation of said road or portion thereof at or within any time so fixed, or shall fail to comply with any of the terms or conditions of such grant, a penalty specified, or the grant and any construction pursuant thereto, may be forfeited to the city.

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3. Such grant shall contain a reservation to the city of the privilege upon giving a specified notice to terminate such franchise and to purchase and take the plant and property of the grantee suitable to and used for the purpose of such railroad at any time after the expiration of ten years from the date when operation of any part of said railroad shall begin upon paying an amount for said plant and property as property, excluding any value for the franchise, which amount shall not exceed actual cost of said plant and property, plus fifteen per centum thereof, and shall decrease under provisions of the grant as the franchise continues so that at the end of the full term of the grant no amount shall be paid except for equipment as hereinafter provided. The grant shall provide a method of ascertaining the amount to be paid for such plant and property upon termination by the city of said franchise and for the equipment of said railroad at the end of the full term of the grant, and the grant may provide for determining from time to time, in default of agreement, by arbitration or by the court, a valuation of such plant and property, or any part or portion thereof, for any purpose under said grant. The grant shall make adequate provision for lien upon plant and property and by way of penalty or forfeiture of the grant and any construction pursuant thereto or otherwise to secure compliance with the terms of said grant, efficiency of service at reasonable rates and the maintenance of the property in good condition throughout the full term of the grant.

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4. The grant shall provide that any and all income and increase derived by the grantee or his assignee or any successive holder of the grant or on his or their behalf in any manner from or in connection with the enterprise of constructing, equipping and operating the said railroad shall after deducting operating expenses, taxes, payments to reserve and amortization funds as provided for in said grant, and not exceeding six per centum interest per annum payable quarterly upon the actual cost of construction and equipment of such road, be divided share and share alike between the grantee and the city, and that upon the expiration of the period specified in the grant the franchise shall end and the plant and property suitable to and used for the purposes of said railroad, except equipment as defined in the grant, shall become the property of the city without compensation to the grantee, and that such equipment shall also become the property of the city upon payment to the grantee of an amount to be ascertained as provided in the grant. The grant may also provide for assuring that in case a new grant of a franchise to maintain and operate the said railroad is made after any such termination of said franchise and purchase and taking of said plant and property pursuant to such notice or after the expiration of the full term of the grant, that the title to and possession of the plant and property so taken and of the equipment at the end of such full term may be transferred directly to the new grantee upon his paying the amount required as aforesaid. At any time within one year prior to the date when the

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franchise shall be terminated or forfeited by the city or shall come to an end by the expiration of full term or at any time thereafter, the commission may with the approval of the board of estimate and apportionment, or such other local authority, grant a new franchise under the provisions of this section for the construction wholly or in part of such railroad and for the maintenance and operation of the same from and after the date of such termination, forfeiture or end of such grant, or the commission may with like approval enter into contracts for the equipment, maintenance or operation of said railroad, or may itself operate said road, after such termination, forfeiture or end of said grant as hereinafter provided in sections twenty-seven to thirty-one in respect of railroads constructed at the public expense.

5. A certificate shall be prepared by the said commission attested by its seal and the signature of its presiding officer, setting forth in detail the action taken and grant made by the said commission with respect to such railroad, and the terms and conditions aforesaid which shall be delivered to said grantee upon the receipt by said commission of a written acceptance of the terms, conditions and requirements of the grant duly executed by said grantee so as to entitle it to be recorded. The said certificate shall be filed in the office of the secretary of state and a duly certified copy thereof shall be filed in the office of the clerk of the county in which the said railroad or some part thereof is situated and upon the fulfillment by such grantee of such terms, conditions and requirements enumerated in such certificate as the commission may re-

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quire to be fulfilled as a condition precedent to commencing said work, the grantee shall in such cases possess in addition to its existing powers, all the powers conferred by this article upon corporations receiving a grant of a franchise thereunder with respect to the railroad so authorized to be constructed as aforesaid and when such certificate shall have been duly filed, such grantee may construct the said railroad with all the rights provided in said certificate but in every case subject to all the provisions and conditions of said certificate. The certificate so prepared by the commission as aforesaid when delivered to and accepted by said grantee shall be deemed to constitute a contract between the city and said grantee according to the terms of said certificate and such contract shall be enforceable by the commission acting in the name of and in behalf of said city, or by the grantee according to the terms thereof, but subject to the provisions of this act. The terms of such contract may from time to time with like approval and with the consent of the grantee be modified by the commission.

6. Any existing railroad corporation owning or actually operating a railroad wholly or in part within the limits of the city and approved by the said commission shall be competent and is hereby authorized to bid for and receive any grant pursuant to the provisions of this section. If the successful bidder or bidders be not a corporation, then a corporation may be organized under the railroad law by him or them for the purpose of receiving such grant and of constructing, equipping, maintaining and operating a railroad pursuant to the terms of any such certificate and a corpora-

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tion so organized shall not be required to procure the certificate o
approval of the public service commission as provided for u
section fifty-nine of the railroad law or section fifty-three of th
public service commissions law.

7. After the proposed certificate shall have been prepared an
approved as to the form thereof by the board of estimate and s
portionment, or other such local authority of said city, the commis
sion shall, prior to the granting of any such franchise, advertis
for proposals or bids for such franchise under such certificate by
notice to be printed once a week for two successive weeks in n
less than two daily newspapers published in said city, and in suc
newspapers published elsewhere than in said city as said com
mission shall determine, and may require security from bidde
for the execution of their bids if accepted. Such notice shall s
forth the points within said city between which such railroad i
proposed to be operated, the route or routes, in general terms, t
be followed, and such other details and specifications as the com
mission shall deem proper, and shall refer to such proposed certi
cate and the said routes, detailed plans and specifications on fi
in its office for further details. Said notice shall state the ti
and place at which proposals will be received and opened. A
such proposals shall refer to said proposed certificate and sha
offer the terms upon which any such proposer or bidder sha
undertake to construct, maintain, equip and operate said railroa
in so far as to set forth all or any of the following matters a
may be required by the commission: (1) the annual interes

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desired upon the cost of construction and equipment prior to payment of any part of income or increase to the city; (2) the period at the end of which the plant and property except equipment as aforesaid shall become the property of the city without compensation; (3) the amount of money for which galleries for subsurface structures to be paid for with public money in connection with the construction of such railroad will be constructed; (4) such transfer conveniences with other roads, specifications as to the cost of construction and other provisions as the commission may think proper to require. The commission shall attend at the time and place specified and shall publicly open all proposals that shall have been received, but the commission shall not be bound to accept any proposals so received, but may reject all such proposals and readvertise for proposals in the manner hereinbefore provided, or may accept any of such proposals as will, in the judgment of said commission, best promote the public interest, and grant a franchise and execute such certificate accordingly, subject to the approval of the board of estimate and apportionment, or other such analogous authority of such city.

§ 6. Section thirty-two of said act as heretofore amended is hereby further amended to read as follows:

§ [32.] *23. Power to fix connecting routes and extend lines.—1.* The [said board of rapid transit railroad commissioners] *public service commission* may also from time to time, as in this section hereinafter provided, with the approval of the board of

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estimate and apportionment, or other analogous local authority of such city, grant a right or rights, franchise or franchises or enter into a contract or contracts, upon application to said [board] *commission* of any railroad corporation now or hereafter incorporated, for the purpose of constructing and operating a tunnel railroad or railroads from an adjoining state under the North or Hudson or Harlem river to a terminus within such city; or under the North or Hudson river and thence transversely across and under the surface of the borough of Manhattan and thence under the East river by the shortest practicable route; such railroad or railroads to be connected with some trunk line railroad or railroads whose terminus or termini are in this or an adjoining state, thereby forming a continuous line for the carriage of passengers and property.

2. A similar grant may be made, or a similar contract or contracts entered into, upon the application of a railroad corporation owning or actually operating a trunk line railroad whose terminus or termini are within such city, or of a railroad corporation owning or actually operating, or by the certificate of the board of rapid transit railroad commissioners *or the public service commission* hereinafter in this section mentioned required to own or actually operate, a railroad wholly or partly within said city and engaged or intended, and in said certificate so recited and required, to be, in interstate commerce in connection with a trunk line railroad and which shall have, or be required by such certificate to have a terminus or termini in said city, for the purpose

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of constructing and operating a railroad or railroads from such terminus or termini by the shortest practicable route to and under or over the East river or the North or Hudson river, or the Harlem river, to any point in this or an adjoining state, or to connect such terminus or termini with the railroad or terminus of any other such railroad or trunk line railroad in this state or to straighten or improve the grade or alignment of any such railroad or more directly connect any points thereon.

3. If and when in the judgment of said [board] *commission* the public interests so demand, the [said board] *commission* may, with like approval, [by the concurrent vote of six of its members] fix and determine the route or routes by which any such railroad corporation making such application may so establish and construct or so extend its lines into or within said city, and may authorize any such railroad corporation to construct and operate any such railroad or connecting railroad under any lands, streets, avenues, waters, rivers, parkways, highways or public places in the said city, and also in the case of any such railroad or connecting railroad which is, or by the terms of the said certificate of the said board of rapid transit railroad commissioners *or the public service commission* is required to be, operated or used as a part of an interstate trunk line, to construct and operate the same over and across any such lands, waters, rivers, streets, avenues, parkways, highways or public places in the said city, but not over and lengthwise of any streets, avenues or highways, with all necessary sidings, platforms, stations, facilities for access to

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the surface and other appurtenances and with the right to emerge to the surface upon private lands at the termini, and to transport over the same passengers or freight or both and to run over the same either passenger trains or freight trains or mixed trains.

4. The [said board] *commission* shall, with like approval, fix and determine the locations and plans of construction of the railroad or railroads upon such route or routes, the times within which they shall be respectively constructed, the compensation to be made therefor to the city by the railroad corporation to which the grant shall be made, or with which the contract shall be entered into, and such other terms, conditions and requirements as to the [said board] *commission* may appear just and proper, provided, however, that every such grant shall be made and every such contract entered into upon the condition that the railroad corporation to which the grant shall be made or with which the contract shall be entered into shall, from the time of the commencement of the operation of any such railroad, annually pay to the said city a sum or rental, and that the amount of such sum or rental for a period of not more than twenty-five years, beginning with such operation of any such railroad, shall be prescribed by the [said board] *commission* in such grant or contract and that every such grant or contract shall provide for the readjustment of the amount of such sum or rental at the expiration of the period for which the same shall be so prescribed and for readjustment from time to time in the future of the amount of such annual payment at intervals each of not more than twenty

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five years. *The grant may also provide that the city shall have the right after the expiration of a period fixed in the grant which shall not be more than twenty-five years from the date on which operation of any portion of said railroad shall commence to purchase and take the right or franchise so granted and any tunnel and railroad thereby authorized, or any portion of such tunnel and railroad, provided the city shall determine that said tunnel and railroad or such portion of said tunnel and railroad is necessary or desirable for use as part of some municipal system of rapid transit to be owned by the city, upon giving a specified notice and upon payment of the value of such tunnel and railroad, or portion of tunnel and railroad, but not including the franchise thereby granted, nor to exceed the actual cost in money of construction thereof and of property connected therewith. The grant may provide in default of agreement thereon for ascertainment and determination by arbitration or by the court of the amount to be paid by the city therefor. This act shall be deemed to have been in full force as hereby amended from before the time when any certificate has been granted by the board of rapid transit railroad commissioners or by said public service commission authorizing the construction and operation of any tunnel and railroad under the provisions of this section, and shall be deemed to have authorized any right heretofore given to any city in or by any such certificate granted as aforesaid to purchase and take any tunnel and railroad, or any portion of said tunnel and rail-*

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road, and every such certificate is as to such right given thereby hereby ratified and confirmed.

5. A certificate shall be prepared by the [said board] *commission* attested by its seal and the signature of its presiding officer setting forth in detail the action taken and grant made or contract entered into by the [said board] *commission* with respect to such railroad or railroads and the terms, conditions and requirements aforesaid, including provisions as to the said annual payments and the future readjustments thereof. A like certificate shall be prepared in like manner upon every modification of the terms of the grant or contract as hereinafter provided. Each such certificate shall prescribe the terms and conditions of the readjustments of such annual payments and may provide for the determination of such amount upon such readjustments by arbitration or by the supreme court. Such certificate shall be delivered to said railroad corporation upon the receipt by said [board] *commission* of a written acceptance of the terms, conditions and requirements of the grant or contract, duly executed by said railroad corporation, so as to entitle it to be recorded.

6. The said certificate shall be filed in the office of the secretary of state, and a duly certified copy thereof shall be filed in the office of the clerk of the county in which the said city is situated, and thereupon, and upon fulfillment by such railroad corporation, so far as it relates to such railroad or railroads, of such of the requirements and conditions as are necessary to be fulfilled in such cases, under section eighteen of article three of

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the constitution of this state, and upon fulfillment by such railroad corporation of such other terms, conditions and requirements enumerated in said certificate, as the said [board] *commission* may require to be fulfilled as a condition precedent to commencing said work, said railroad corporation shall in such cases possess in addition to its already existing franchises all the powers conferred by this act upon corporations [specially formed thereunder,] with respect to its [railways] *railroads* authorized to be constructed as aforesaid, and when any route or routes, rights or franchises, shall be so fixed and determined, and a certificate as aforesaid shall have been duly filed, such railroad corporation may construct the same with all the rights, and with like effect as though the same had been a part of the original route of its railroad then in actual operation, or as may be provided in said certificate, but in every case subject to all the provisions and conditions of the said certificate. Every certificate prepared by the board of rapid transit railroad commissioners *or the public service commission* as aforesaid when delivered to and accepted by such railroad corporation, shall be deemed to constitute a contract between the said city and said railroad corporation, according to the terms of said certificate; and such contract shall be enforceable by the [said board] *commission* acting in the name of and in behalf of the said city or by the said corporation according to the terms thereof, but subject to the provisions of this act. The terms of such contract may from time to time, with like approval and with the consent of such corporation, be modi-

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fied by the [board of rapid transit railroad commissioners] *commission* [by the vote of six of its members].

7. But the construction and operation of such railroad or railroads are [hereby] authorized only upon the condition that the consent of the owners of one-half in value of the property bounded on, and the consent also of the local authorities having control of that portion of a street or highway upon, above or under which it is proposed to construct or operate the same, be first obtained, provided that such local authorities shall, upon the presentation to them of any such grant or contract, without requiring the execution of any other agreements than those herein provided for, either approve or disapprove the same; and every such approval shall be and be deemed to be, free of all limitations except those contained in this act or the constitution of the state. In case the consent of such property owners can not be obtained, the appellate division of the supreme court in the department in which such railroad or railroads are proposed to be constructed, may, upon application, in the same manner and on the same notice specified in section five of this act, appoint three commissioners, who shall determine after a hearing of all parties interested, whether the same ought to be constructed or operated, and their determination confirmed by the court, may be taken in lieu of the consent of such property owners. [Nothing in this act contained shall be construed as interfering in any way with the jurisdiction, powers and duties of the board of railroad commissioners of the state of New York, nor shall any.]

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8. No grant or contract shall be made hereunder affecting in any way the liabilities and obligations of the grantee or contracting railroad corporation with reference to taxation for state or local purposes. The state of New York shall not be liable for injuries to persons or property in connection with any railroad or other construction which may be authorized under the provisions of this act, nor shall the state of New York be liable for any damages in any event for any act or omission of the [board of rapid transit railroad commissioners] *public service commission.*

§ 7. Section thirty-two-a of said act is hereby amended to read as follows:

§ [32-a] *24. Connections with other railroads, stations and ferries. 1.* The [said board of rapid transit railroad commissioners] *public service commission* may also from time to time, with the approval of the board of estimate and apportionment, upon application of any person, firm or corporation owning, leasing, constructing or actually operating a railroad wholly or in part within the limits of the city in which the [said board] *commission* has power to act, if in the judgment of said [board] *commission*, the public interests so demand, [by the concurrent vote of six of the members of said board] fix and determine the route or routes by which any such person, firm or corporation may connect with other [railways] *railroads*, or the stations thereof, or with ferries, or may extend his or its lines within said city, and may with like approval authorize any such person, firm or corporation to lay an

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additional track or tracks on, above, under or contiguous to a portion or the whole of the route or routes of his or its [railway] *railroad* or [railways] *railroads* within said city and to acquire terminal or other facilities necessary for the accommodation of the traveling public on any street or place except the place known as Battery park on which said [railway] *railroad* shall be located; and may also with like approval authorize any such person, firm or corporation to lay his or its tracks and operate his or its [railway] *railroad* to any terminal or terminals within the said city, and to transport over the same passengers or freight or both, and to run over the same either passenger trains or freight trains or mixed trains; and the [said board] *commission* shall with like approval fix and determine the locations and plans of construction of the [railways] *railroads* upon such route or routes and of such tracks and facilities, the times within which they shall be respectively constructed, the compensation to be made therefor to the city by said person, firm or corporation, and such other terms, conditions and requirements as to the said boards may appear just and proper, provided, however, that every such determination, authorization and license shall be made upon the condition that such person, firm or corporation shall from the time of the commencement of the operation of any such [railway] *railroad* or track or tracks under such determination, authorization or license, annually pay to the said city a sum or rental, and that the amount of such sum or rental for a period of not more than twenty-five

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years, beginning with such operation of or any such [railway] *railroad*, track or tracks, shall be prescribed by the [said board] *commission* in such determination, authorization and license, and that every such determination, authorization and license shall provide for the readjustment of the amount of such sum or rental at the expiration of the period for which the same shall be so prescribed and for readjustment from time to time in the future, to the end of the period of renewal, if any, of the amount of such annual payment at intervals each of not more than [ten] *twenty* years. [No] Such determination, authorization or license shall [be made for a longer period than twenty-five years but may provide for renewal or renewals thereof not to exceed twenty years in the aggregate.] *contain a reservation to the city of the privilege, upon giving a specified notice, to terminate the franchise, right or authority granted under this section and to purchase and take the plant and property as defined in the grant at any time after the expiration of ten years from the date when operation of any part thereof shall actually begin, upon paying an amount for said plant and property as property, excluding any value for the franchise, right or authority, which amount shall not exceed actual cost of said plant and property plus fifteen per cent. thereof and shall decrease under provisions of the grant as the franchise continues, so that at the end of the full term of the grant or at the end of a period specified therein, no amount shall be paid except for equipment as hereinafter provided. The grant shall provide a method of ascertaining the amount to be paid for said plant and property*

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on termination by the city of the said franchise, right or authority and for the equipment at the end of the full term of the grant, and may provide for determining from time to time in default of agreement by arbitration or by the court a valuation of such plant and property or any part or portion thereof for any purpose under such grant. Such determination, authorization or license may also make suitable provision to the end that if the city shall after so terminating such franchise, right or authority or at the end of the full term of the grant propose to give a new franchise, right or authority in the enjoyment of which said plant and property or any part thereof may be utilized, the title to and possession of said plant and property or any part thereof may be transferred directly to the grantee of any such new franchise, right or authority when the said new grantee shall pay the amount so required.

2. A certificate shall be prepared by the [said board] *commission, attested by its seal and the signature of its presiding* officer, setting forth in detail the action taken by the [said board] *commission* with respect to such connecting or extended route or routes and such tracks and facilities, and the terms, conditions and requirements aforesaid, including provisions as to the said annual payments and the future readjustments thereof. A like certificate shall be prepared in like manner upon every modification [or renewal] of the terms of the contract as hereinafter provided. Every such certificate shall prescribe the terms and conditions of the readjustments of such annual payments and may provide for the determination of such amount upon such read-

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justments by arbitration or by the supreme court. Such certificate shall be delivered to said person, firm or corporation upon the receipt by said [board] *commission* of a written acceptance of said terms, conditions and requirements, duly executed by said person, firm or corporation, so as to entitle it to be recorded.

3. The said certificates shall be filed in the office of the secretary of state, and a duly certified copy thereof shall be filed in the office of the clerk of [the] *each* county [in] *to* which the said [city is situated] *privileges granted hereunder pertain*, and thereupon, and upon fulfillment, by such person, firm or corporation, so far as it relates to such connection, additional track or tracks, or facilities, of such of the requirements and conditions as are necessary to be fulfilled in such cases, under section eighteen of article three of the constitution of this state, and upon fulfillment by such person, firm or corporation of such other terms, conditions and requirements enumerated in said certificate, as the [said board] *commission* may require to be fulfilled as a condition precedent to commencing said work, said person, firm or corporation shall in such cases possess in addition to existing franchises all the powers conferred by this act upon corporations [specially formed thereunder] with respect to his or its [railways] *railroads* authorized to be constructed as aforesaid, and when any route or routes, additional track or tracks, or terminal or other facilities, shall be so fixed and determined, and a certificate as aforesaid shall have been duly filed, such person, firm or corpora-

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ment at the end of the full term thereof, and may provide for determining from time to time in default of agreement by arbitration or by the court a valuation of such plant and property or any part or portion thereof for any purpose under said grant. The grant in such case may also make suitable provision to the end that if the city shall after so terminating such original grant or franchise or at the end of the full term thereof propose to grant a new franchise, right or authority in the enjoyment of which said plant and property or any part thereof may be utilized, the title to and possession of the said plant and property or any part thereof may be transferred directly to the grantee of any such new franchise.

5. But the construction and operation of such connections, extensions, additional track or tracks or facilities are hereby authorized only upon condition that the consent of the owners of one-half in value of the property bounded on, and the consent also of the local authorities having the control of that portion of a street or highway upon, above or under which it is proposed to construct or operate the same, be first obtained, or in case the consent of such property owners cannot be obtained, the appellate division of the supreme court in the [districts] *department* in which they are proposed to be constructed, may, upon application, in the same manner, and on the same notice specified in section five of this act, appoint three commissioners who shall determine after a hearing of all the parties interested whether the same ought to be constructed or operated, and their determination, confirmed by the court, may be taken in lieu of the consent of the property owners

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6. Every such certificate granting any franchise, right or authority, as aforesaid, *except for additional track or tracks added to any existing elevated rapid transit railroad* shall provide *that upon the expiration of a period fixed therein the franchise shall end and* that upon [the] *such* termination thereof all the rights of property of the grantee in the streets, avenues, parkways, highways and public places shall cease and terminate without compensation and shall further provide that upon such [termination] *expiration* of such franchise, right or authority the plant and structure together with the appurtenances thereto, of the grantee, constructed pursuant to such certificate, except [rolling stock and other movable] equipment *as defined in the grant,* shall become the property of the city without further or other compensation to the grantee; [but such certificate may provide] *and* that [upon] such [termination there shall be a fair valuation of the rolling stock and other movable] equipment[, which] shall be and become the property of the city [on the termination of the grant] on paying the grantee [such valuation] *the amount ascertained as provided pursuant to said certificate.* The provisions of this section shall apply to any railroad or railroads constructed, constructing or contracted for under the provisions of section [thirty-four] *twenty-six* of this act and to any person, firm or corporation constructing or operating such railroad or railroads.

§ 8. Section thirty-three of said act as heretofore amended is hereby further amended to read as follows:

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§ [33] *25. Interference with other tracks, pipes, sewers* a
conduits.—1. Wherever or whenever the route selected by t
[said board of rapid transit railroad commissioners] *public servi*
commission for the construction of such [railway] *railroad* sha
intersect, cross or coincide with any [railway] *railroad* track
tracks occupying the surface of any streets or avenues, or the co
struction or operation of said [railway] *railroad* shall interfe
with any pipes, sewers, subways, or underground conduits or way
any corporation [organized under this act,] or any contractor
person constructing any [railway] *railroad* or part of a [railway
railroad under any contract made with the board of rapid trans
railroad commissioners *or the commission*, is hereby authorize
for the purpose of constructing the said work, to remove the tra
or tracks of any such surface [railway] *railroad* or [railways
railroads, or any such pipes, sewers, subways, or underground co
duits or ways, but the same shall be done in such manner as
interfere as little as possible with the practical operation or wor
ings of such surface [railway] *railroad* or [railways,] *railroad*
or the works or business of the owners of any such pipes, sewer
subways, or underground conduits or ways, and upon the constru
tion of such [railways] *railroads* built under and in conformi
with the provisions of this act, where such removals or chang
have been made, said track or tracks, pipes, sewers, subways,
underground conduits or ways shall be restored as nearly as ma
be to the condition in which they were previous to the constructi

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of any such [railway] *railroad* built under the provisions of this act, and any damages which such company or companies or owners may sustain shall be ascertained by a commission to be appointed the same as in the case where lands are taken for the purpose of a [railway] *railroad* route or routes as hereinbefore provided in this act.

2. For the purpose of the construction or operation of any [railway] *railroad* under the provisions of this act, the [board of rapid transit railroad commissioners] *public service commission* may remove or cause to be removed, any pipes, sewers, subways or underground conduits or ways underneath any street, highway, park, or public place; provided, however, that the same shall be replaced as soon as practicable, either in the same position as before or in a secure and convenient position underneath such street, highway or public place, or underneath such other street, highway or public place as may be approved by the head of the department of public works of the city. Provided, however, that nothing in this section contained shall authorize the permanent removal from any street, highway, park or public place of any subways or conduits for the reception of electrical conductors which shall have been placed in such street, highway or public place prior to the construction of the rapid transit railroad, without the consent of the owner and lessee of such subway or conduit.

3. All such removals and restorations shall be made at the proper cost and charge of such corporation, contractor or person

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as may have made such removals, but subject to the provisions of its, his or their contract, if any, with the board of rapid transit [railway] *railway* commissioners *or the public service commission*. Nothing contained in this act shall authorize any corporation [formed thereunder] to use the tracks of any horse [railway] *railroad*. For the purpose of facilitating construction, and to diminish the period of occupancy of any street for the transportation of material, any contractor acting under a contract made in pursuance of this act, or of any act supplementary hereto or amendatory hereof, may with the approval of the [board of rapid transit railroad commissioners] *public service commission*, lay upon or over the surface of any street, temporary tramways, to be used only for the removal of excavated materials or the transportation of material for use in the construction; provided, however, that any such tramway shall be forthwith removed upon the direction of the [board of rapid transit railroad commissioners] *public service commission*; and provided, further, that this provision shall not be construed to authorize the construction or operation of any street railroad or to grant to any corporation, association or individual the right to lay down railroad tracks.

§ 9. Section thirty-four of said act as heretofore amended is hereby further amended to read as follows:

§ [34] *36. Municipal construction; public service commission in a city formed by consolidation.* 1. [In case the people shall determine by vote, as provided in sections twelve and thirteen of chapter seven hundred and fifty-two of the laws of eighteen hundred

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and ninety-four, that any such railway or railways shall be constructed for and at the expense of such city, then and in that event] It shall be the duty of said [board] *public service commission* to consider the routes, plans and specifications, if any, previously laid out and adopted by them or their predecessors, and for which the consents have been obtained referred to in section five of this act; and either to proceed with the construction of such [railway] *railroad* or [railways,] *railroads,* and provide for the operation of the same, as hereinafter provided, or to change and modify the said routes, plans or specifications in such particulars as to said [board] *commission* may seem to be desirable, or from time to time and with or without reference to former routes or plans to adopt other or different or additional routes, plans and specifications for such [railway] *railroad or* [railways,] *railroads,* provided always, that in all cases in which any such change or modification shall be of such character as to require the consents thereto referred to in section five of this act; and in all cases where other or different routes or general plans may have been so adopted the [said board] *commisison* shall proceed to secure the consent required to be obtained by said section five of this act as herein set forth. [If any city has been or shall have been formed by the union or consolidation of one or more cities and other territory, and if in or for one of such cities so consolidated or united there shall have been a board of rapid transit railroad commissioners as

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provided in this act, the board of rapid transit railroad commissioners for the said city formed by such union or consolidation shall have for and within such city so formed all the powers, and be subject to all the duties and responsibilities, which at the time of such union or consolidation belonged to the board of rapid transit railroad commissioners of the former city so as aforesaid possessing such board for or in or with respect to such former city. If in such former city the vote of the qualified electors thereof shall have been for municipal construction of rapid transit road as prescribed in sections twelve and thirteen of chapter seven hundred and fifty-two of the laws of eighteen hundred and ninety-four, then the system of municipal construction of rapid transit railways provided for in this act and all of the provisions with respect thereto in this act contained shall be applicable to, and in full force within, all the districts or boroughs and throughout the entire area of the said city formed by such union or consolidation.] The [board of rapid transit railroad commissioners for any city] *public service commission* shall, prior to the time of the final grant of any franchise under the provisions of this act or the making of a contract for construction of any railroad under the provisions of this act, have power to rescind and revoke any resolution or resolutions of such [board] *commission or its predecessors* adopting any routes or general plan for a rapid transit railroad adopted by such [board] *commission or its predecessors* and, in the discretion of such [board] *commission*, in lieu thereof to adopt new routes and general plan. Every such rescindment

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or revocation which shall have been heretofore made *by said commission or its predecessors* shall be deemed to have been lawful and authorized by this act, as the same was in effect prior to the present amendment hereof.

2. As soon as such consents, where necessary, shall have been obtained for any rapid transit railroad or railroads and the detailed plans and specifications have been prepared as provided in section six of this act, the said [board] *commission*, for and in behalf of said city, [shall] *may* enter into contract *or contracts* with any person[,] *or persons*, firm *or firms*, or corporation *or corporations*, which in the opinion of said [board] *commission* shall be best qualified to fulfill and carry out said contract[,] *or contracts* for the construction of such road or roads, including such galleries, ways, subways and tunnels, for subsurface structures as said commission may include in the plans for such road or roads under the authority of section six of this act; upon the routes and in accordance with the plans and specifications so adopted, for such sum or sums of money, to be raised and paid out of the treasury of said city, as hereinafter provided, and on such terms and conditions, not inconsistent with the aforesaid plans and specifications, as said [board] *commission* shall determine to be best for the public interests. The sum or sums of money to be paid for the construction of such road or roads shall be separately stated in the contract *or contracts* from the sum or sums to be paid for any galleries, ways, subways or tunnels for subsurface structures, the construction of which is pro-

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vided for in such contract *or contracts*. And said [board] *commission* may in any case contract for the construction of the whole road, or all the roads provided for by the aforesaid plans in a single contract, or may by separate contracts, executed from time to time, or at the same time, with one or more such persons, firms or corporations, provide for the construction of *a part or* parts of said road or roads or for the construction at first of two or more tracks over a part or parts of such road or roads and afterwards of one or more additional tracks over a part or parts of such road or roads as the necessities of said city and the increase of its population or the advantageous and economical performance of the work may in the judgment of said [board] *commission* require[.]*; or the said commission may in its discretion by separate contracts executed from time to time or at the same time contract with one or more persons, firms or corporations for the performance of any kind or kinds of work or any portion or portions of the work or for the furnishing of any material or materials or for the performance of any labor necessary for or incidental to the construction of the said road or roads or any part or parts thereof.*

3. The [board] *commission* may also, in a contract for a part of any such rapid transit railroad, insert a provision that at a future time, upon the requirement of the [board] *commission*, the contractor shall construct the remainder or any part of the remainder of said road, as the growth of population or the interests of the city may, in the judgment of the [board] *commission*,

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require and may, in such contract, insert a provision of a method for fixing and ascertaining at such future time the amount to be paid to the contractor for such additional construction, and to the end of such ascertainment may provide for arbitration or for determination by court of the amount of such compensation, or of any other details of construction which shall not be prescribed in the contract, but which shall be deemed necessary or convenient by said [board] *commission*. Any such contract may provide, if the public interest shall, in the opinion of the [board] *commission*, justify the provision, that the construction of any section or portion of the railroad included in such contract may, with the consent of the [board] *commission*, be suspended during the term of operation of the railroad as hereinafter mentioned, or any part of such term; provided that during such term or part of term there shall be available for use, in lieu of such portion of the road, a railroad or a portion or section thereof, which shall, with the railroad or portion of railroad constructed under such contract, form a continuous and convenient route.

4. Any such contract may be made for the construction of said road in sections, or for the construction of any section or sections thereof; and, except as herein otherwise provided, every such contract shall specify when the construction of the railroad or the section or sections thereof included therein shall be commenced in each case, and, in each case, the date of completion. The said [board] *commission* may by any such contract determine when

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thereof, and shall decrease under provisions of the contract as the term thereof continues so that at the end of the full term of the contract no such amount shall be paid.

The contract shall provide a method of ascertaining the amount to be paid for said equipment and for the contractor's said investment in the construction of said road upon termination by the city of any such contract and for the equipment of such railroad at the end of the full term of the contract, and the contract may provide for determining from time to time in default of agreement by arbitration or by the court a valuation of the contractor's said investment in the construction of said road and of the equipment or any part or portion of either thereof for any purpose under said contract. The contract shall also provide that upon the expiration of a period fixed in the contract, the term of said contract shall end without compensation to the contractor except for equipment suitable to and use for the purposes of said contract and that said equipment shall become the property of the city upon payment to the contractor of the amount ascertained as provided in the contract. The contract may also provide for assuring that in case a new contract under this section for equipment and for maintenance and operation of such railroad or railroads is made after such termination pursuant to notice or after the expiration of the full term of the contract that the title to and possession of the equipment so taken and the right to the possession of the railroad so constructed may be transferred directly to the new contractor upon his paying the amount so required.

2. Every such contract shall contain such terms and conditions as to the rates of fare to be charged and the character of services to be furnished and otherwise as said [board of rapid transit railroad commissioners] *commission* shall deem to be best suited to the public interests, and subject to such public supervision and to such conditions, regulations and requirements as may be determined upon by said [board] *commission*, with like approval; provided, that in case different parts of a road shall be constructed at different times or at intervals of time, or if the contract shall provide for the use by the contractor of an existing railroad as part of a continuous route as aforesaid, then and in any such case the [board of rapid transit railroad commissioners] *public service commission* may, in its discretion, prescribe periods for the operation of the different parts of said road so that at one period of time in the future the [board] *commission* may be enabled to make a single operating contract or lease of the entire road.

3. Every such contract shall further provide that the person, firm or corporation so contracting to equip, maintain and operate said road shall annually *or at specified intervals* pay into the treasury of said city, [as] *such* rental for the use of said road, *as shall be prescribed therein. The rental may be either a specified sum of money or a specified proportion of income, earnings or profits of such road, or both a sum of money and a proportion of income, earnings or profits, as the said commission shall deem*

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best suited to the public interest and the board of estimate and apportionment or other analogous local authority of such city shall approve. Every such contract may further provide that the amount and character of such rental may be readjusted at the expiration of a prescribed period, which shall not be more than twenty years, and shall be readjusted from time to time in the future at intervals each of not more than twenty years, and may prescribe a method of determining by arbitration or by the court the amount to be paid upon any readjustment thereof, [a sum which shall not, except as hereinafter provided, be less than the annual interest upon the bonds to be issued by said city for the construction and equipment of said road as hereinafter provided for, and in addition to said interest, a further sum which shall be equal to a percentage of not less than one per centum upon the whole amount of said bonds; provided, that in estimating such annual interest and additional percentage there shall be deducted from the amount of said bonds the amount thereof issued to pay for rights, terms, easements, privileges or property other than lands acquired in fee, and also the amount thereof issued to pay for the construction of galleries, ways, subways and tunnels for subsurface structures. And provided, further, that the said contract may, in the discretion of the said board, provide that the payment of the said further sum of not less than one per centum upon the amount of said bonds as aforesaid, shall begin at a date not more than five years after the date at which the payment of rental shall begin, and that the said annual rate

instead of one per centum, may be a rate not less than one-half per centum for a further period not exceeding five years; but in case the contractor shall, during any year in which the said payment of one per centum shall be suspended or reduced as aforesaid, earn a greater profit upon his, its or their net capital invested in the enterprise than five per centum, then the surplus of his, its or their earnings for such year up to the extent of at least one per centum shall be paid as rental as aforesaid.]

4. Such rental and the term for the operation of the railroad included in any such contract shall begin, as to said road, or any section thereof, when the same shall be declared by the [board of rapid transit railroad commissioners] *public service commission* to be completed and ready for operation. [For the purpose of estimating such one per centum per annum upon the ascertainment of the amount of such rental, there shall be included such portion of the said bonds as shall have been issued to pay interest on bonds theretofore issued under the provisions of this act, except bonds issued to pay for rights, terms, easements, privileges or property other than lands acquired in fee.] The aforesaid [annual] rental shall be paid at such times during each year as said commission shall require. [.] *If a contract to equip, maintain and operate such road be made with the person, firm or corporation having or to have the contract to construct the same, the contract may provide that, in lieu of the rental above provided for, said road shall be constructed wholly or in part at the cost of the said person, firm or corporation, the said road, however, to be the*

property of the city in the same manner and to the same extent as if constructed wholly with public money, and in such case the contract shall also provide that any and all income and increase derived by the contractor or on his behalf in any manner from the enterprise of constructing, equipping, maintaining and operating such road, shall after deducting operating expenses, taxes, payments to reserve and amortization funds as provided for in the contract, and not exceeding six per cent. interest per annum payable quarterly upon the actual cost to the contractor of construction and equipment of such road, be divided share and share alike between the contractor and the city. The rental and any sums payable under such contract shall be applied first to the payment of the interest upon [said] bonds *issued by said city for the construction and equipment of said road as hereinafter provided for* as the same shall accrue and fall due, and the remainder of said rental *and moneys* not required for the payment of said interest shall be [paid into the sinking fund for the payment of the city debt if there shall be such sinking fund in such city, or if there be none such, then said balance of said rental shall be] *kept separate and apart from any and all other moneys of such city and shall be* securely invested and, with the annual accretions of interest thereon, shall constitute a sinking fund for the payment and redemption at maturity of the bonds issued as [hereinafter provided.] *aforesaid; said rental, moneys and accumulations of said fund over and above so much as may be required for payment of*

interest and principal of said bonds as aforesaid, shall be paid into the rapid transit fund hereinafter provided for.

5. Any such contract may also provide for a renewal or renewals not to exceed twenty years in the aggregate of the lease of said road upon the expiration of [the] *an* original term *of not more than twenty years* upon such terms and conditions, to be approved by the board of estimate and apportionment, or other analogous local authority of such city, as to said commission may seem just and proper, and may also contain provisions for the valuation of the whole or a part of the property of said contracting person, firm or corporation, employed in and about the equipment, maintenance and operation of said road, and for the purchase of the same by the city, at such valuation, or a percentage of the same, should said lease not be so renewed at any time, *or should the same be terminated or expire as aforesaid.* Such contract shall also state the date on which the operation of the road, or any section thereof, shall commence.

6. The city in and for which said road shall be constructed shall also have a first lien upon the rolling stock and other property of said contracting person, firm or corporation, constituting the equipment of said road and use or intended for use in the maintenance and operation of the same, as further security for the faithful performance by such contracting person, firm or corporation of the covenant, conditions and agreements of said contract, on his, their, or its part to be fulfilled and performed, and

in case of the breach of any such covenant, condition and agreement said lien shall be subject to foreclosure by action, at the suit of such city, in the same manner, as far as may be, as is then provided by law in the case of foreclosure by action of mortgages on real estate. The [said board of rapid transit railroad commissioners] *commission*, may, however, from time to time, [by a concurrent vote of six of the members of said board] relieve from such lien, any of the property to which the same may attach, upon receiving additional security, which may be deemed by said [board] *commission* [so voting] to be the equivalent of that which it is proposed to release and otherwise upon such terms as to such [board] *commission* [so voting] shall seem just.

7. The said contract shall further provide that in case of default in paying the [annual] sum or rental therein provided for, or in case of the failure or neglect on the part of said contracting person, firm or corporation, faithfully to observe, keep and fulfill the conditions, obligations and requirements of said contract, the said city, by [its board of rapid transit railroad commissioners] *the public service commission*, may take possession of said road and the equipment thereof, and as the agent of said contracting person, firm or corporation, either maintain and operate said road, or enter into a contract with some other person, firm or corporation for the maintenance and operation thereof, retaining out of the proceeds of such operation, after the payment of the necessary expenses of operation and maintenance, the [annual] *sum or* rental hereinbefore referred to, and paying over the balance, if

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any, to the person, firm or corporation with whom the first contract above mentioned was made, and if such proceeds of the operation of said road, after the payment of the necessary expenses of maintenance and operation, including the keeping in repair of the rolling stock and other equipment, shall in any *period* [year] be less than the [annual] *sum or* rental hereinbefore referred to and provided in the first contract, then and in that case, the said contracting person, firm or corporation, and his or its bondsmen, shall be and continue (but in the case of any bond hereafter executed, each bondsman only to the extent of the liability expressly assumed by him upon the bond) jointly and severally liable to the aforesaid city for the amount of such deficiency, until the end of the full term for which the said first contract was originally made.

8. Any existing [railway] *railroad* corporation owning or actually operating a [railway] *railroad* wholly or in part within the limits of the city in and for which said [board] *commission* has power to act, and approved by the [said board of rapid transit railroad commissioners] *commission*, shall be competent and is hereby authorized to enter into any contract for the equipment, maintenance and operation of any [railway] *railroad* pursuant to the provisions of this chapter, or, after such a contract shall have been made, shall be competent and is hereby authorized, with the approval of the [said board] *commission*, to contract with the original contractor or his assignee or assignees for the maintenance and operation, (including the equipment or any part thereof,) of any [railway] *railroad* constructed or in process of construction

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pursuant to the provisions of this chapter, and shall have all the powers necessary to the due performance of such contract. A corporation may be organized under the railroad law of this state, for the purpose of maintaining and operating a [railway] *railroad*, (including the equipment or any part thereof), already constructed or in process of construction pursuant to the provisions of this chapter; and any corporation so organized, upon the approval in writing of the [said board of rapid transit railroad commissioners] *commission*, shall, in addition to the powers conferred by the general act under which such corporation is organized, be empowered, and is hereby authorized to enter into any contract permitted by law for the maintenance and operation when constructed, including the equipment or any part thereof if desired, as the case may be, of any such [railway] *railroad* constructed or to be constructed at the expense of the city as in this act provided. The certificate of such approval shall be filed in the office of the secretary of state, and a copy thereof certified to be a true copy by the secretary of state or his deputy, shall be evidence of the fact therein stated. A corporation so organized shall not be required to procure the consent of the [board of railroad commissioners of the state] public service commission as provided for in section fifty-nine of the railroad law.

9. Where in this section or in section [thirty-four] *twenty-six* of this act the consents referred to in section five of this act are mentioned, they shall be construed to include any consent given by the commissioners appointed by the general term or appellate

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division of the supreme court, and confirmed by the said general term or appellate division in lieu of the consent of property owners as hereinbefore provided.

§ 11. Section thirty-four-b of said act is hereby amended to read as follows:

§ [34-b] *28. Contract for maintenance and operation.* If in the opinion of the board of estimate and apportionment, or other analogous local authority of such city, a contract for the equipment, maintenance and operation as provided for in the preceding section shall be inexpedient, impracticable or prejudicial to the public interest, the [board of rapid transit railroad commissioners] *public service commission* may, with the approval of the board of estimate and apportionment, or such other analogous authority, equip the said road or roads in whole or in part, for and at the public expense, by contract or contracts therefor subject to the provisions of section thirty-six of this act, and enter into a contract with any person, firm or corporation, who or which in the opinion of said [board of rapid transit railroad commissioners] *commission* shall be best qualified to fulfill and carry out said contract, for the maintenance and operation of such road or roads for a term of years to be specified in said contract, and not to exceed ten years. The provisions of the foregoing sections in respect of a contract or contracts for the equipment, maintenance and operation of such road or roads shall apply to such contract for maintenance and operation so far as such provisions are pertinent and

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applicable thereto except [that the annual rental to be paid into the city treasury for the use of said road or roads shall be based upon the total amount of bonds issued by said city for the construction and equipment, instead of for the construction alone, of said road or roads as hereinafter provided for and] that the renewal or renewals of said contract provided for therein shall not exceed in the aggregate ten years.

§ 12. Section thirty-four-c of said act is hereby amended to read as follows:

§ [34-c] *29. Terms of contract for construction or operation.*

1. Every contract for the construction or operation of such road or roads shall provide by proper stipulations and covenants on the part of the said city, that the said city shall secure and assure to the contractor, so long as the contractor shall perform the stipulations of the contract, the right to construct or to operate the road as prescribed in the contract, free of all right, claim or other interference, whether by injunction, suit for damages or otherwise, on the part of the owner, abutting owner, or other person. The person, firm or corporation bidding or contracting for the construction, equipment, maintenance or operation of the railroad or railroads included in any such contract shall make such deposit of cash or securities and shall give a bond to said city, in such amount as said [board of rapid transit railroad commissioners] *public service commission* shall require, and with sureties to be approved by said [board] *commission*, who shall justify each in double the amount of his liability upon said bond. Said

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bond shall be a continuing security, and shall provide for the prompt payment by said contracting person, firm or corporation, of the amount of annual rental, if any, specified in the aforesaid contract, and also for the faithful performance by said contracting person, firm or corporation of all the conditions, covenants and requirements specified and provided for in said contract. In lieu of said continuing bond such contracting person, firm or corporation may, upon the approval of the said [board] *commission*, deposit with the comptroller or other chief financial officer of such city cash equal in amount to the entire amount of the said bond or securities which are lawful for the investment of the funds or savings banks within this state and are worth not less than the entire amount of such bond. If such bond shall have been given then after the deposit of cash and securities in lieu thereof as aforesaid, and the approval thereof by the [said board] *commission*, the said bond shall be surrendered by the said city to the said contracting person, firm or corporation duly cancelled by the comptroller or other chief financial officer of the said city. In the event of the deposit of cash or securities as aforesaid, the contract may provide for the payment to the contractor of the income of such securities or of interest upon such moneys at a rate not higher than the highest rate received by the city upon the deposit of its funds with banks, and may also provide for withdrawal of securities so deposited upon deposit of cash or securities of the same value, provided that all such securities shall be such as are so lawful for the investment of the funds of savings banks. The [said

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board] *commission* may in or by any such contract and in its discretion require, and this act, as the same was prior to the present amendment thereof, shall be deemed to have authorized the [said] board *of rapid transit railroad commissioners* to have heretofore required any other security upon any such contract.

2. No contract entered into under authority of this act shall be assigned without the written consent of the [said board of rapid transit railroad commissioners] *commission*. [concurred in by six members of said board.] The said contracting person, firm or corporation, with such written consent and upon such terms and conditions as the [said board] *commission* shall prescribe, may either assign the whole of such contract or separately the right or obligation to maintain and operate the said road or roads for the remainder of the term of years specified in such contract and all rights with respect to such maintenance and operation, or included in the leasing provisions of such contract, but subject to all the terms and conditions therein stated; provided, however, that the assignee or assignees shall, in and by such assignment, assume all of the obligations of the original contractor under or with respect to such leasing provisions and all obligations which relate in any way to such operation and maintenance; and provided, further, that the [said board] *commission* before giving its consent shall be satisfied that the pecuniary responsibility of the assignee or assignees shall be no less than that of such original contractor; and provided, further, that all of the security or securities which the city shall have received for the performance by the

original contractor of such leasing provisions and of all provisions of the contract with respect to such operation and maintenance shall continue in full force as provided in such contract or any modification thereof, as security for the performance by such assignee of all obligations of the contractor under or with respect to such leasing provisions and such maintenance or operation.

3. It shall be deemed to be part of every such contract that, in case the [board or rapid transit railroad commissioners] *public service commission* shall cease to exist, the legislature may provide what public officer or officers of the city shall exercise the powers and duties belonging to the [board of rapid transit railroad commissioners] *commission* under or by virtue of any such contract, and that in default of such provision, such powers and duties shall be deemed to be vested in the mayor of the city. Every such contract shall provide that if the contracting person, firm or corporation shall fail to construct, equip, maintain or operate the [railway] *railroad* according to the terms of the contract, and shall, after due notice of its default, omit for more than a reasonable time to comply with the provisions of such contract, the [board of rapid transit railroad commissioners] *public service commission* may bring an action in the name and in behalf of the city to forfeit and vacate all the rights of such contracting person, firm or corporation under such contract, and for damages and otherwise as may be necessary for the sufficient and just protection of the rights of the city; or may, upon such terms as to

the [board of rapid transit railroad commissioners] *public service commission* seem just, and with such person or corporation as to the [said board] *commission* may seem proper, make another operating contract and lease of the said road for the residue of the term of the contractor in default; and may bring action in the name and on behalf of the city to recover from the contractor the amount due from the contractor, less the amount which shall have been received by the city, under or by virtue of such new contract, and for all other damages sustained by the city by reason of such default.

§ 13. Sections thirty-four-d and thirty-four-e of said act are hereby amended to read as follows:

§ [34-d] *30. Plans for maintenance and operation of road by public service commission.*

1. If in the opinion of the board of estimate and apportionment, or other analogous local authority of such city, either a contract for equipment, maintenance and operation, or a contract for maintenance and operation as provided for in the preceding sections would be inexpedient, impracticable or prejudicial to the public interest, the [board of rapid transit railroad commissioners] *public service commission* shall forthwith devise and prepare a plan for the maintenance and operation of such road or roads, *either by the commission or under a contract or contracts for the use of the tracks of said railroad or railroads for operation of cars thereon during a term of not more than five years for the*

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carrying of passengers and property by one or more corporations approved by the commission owning or operating any railroad or railroads in said city, or organized for the purpose of operating cars as aforesaid over or upon said rapid transit railroad or railroads, and when said plan shall have been approved by the board of estimate and apportionment, or other analogous local authority of such city, the said [board of rapid transit railroad commissioners] *commission* shall *either* maintain and operate such road or roads for and on behalf of said city, *or allow the use of the tracks of such railroad or railroads for the operation of cars for the transportation of persons or property by any such corporation or corporations.* The *compensation to be made or the* rates of fare provided for in any operating contract or plan aforesaid *shall be fixed by the commission with the approval of said board and* shall be adjusted, fixed and readjusted always with a view to securing *as nearly as may be* sufficient receipts therefrom, when added to the net revenues from such galleries, ways, subways or tunnels, and all other sources incidental or appurtenant to the use and operation of said road or roads, to provide for operating expenses, maintenance, interest on the cost, all other proper charges, and a sinking fund to discharge the bonds issued for the construction and equipment of such road or roads within a reasonable period, without recourse to taxation. Whenever it shall seem practicable to reduce rates of fare, the reduction shall in the first instance be in favor of school children, and then, next in order, in favor of all the public between six and nine o'clock ante meridian, and be-

tween four and seven o'clock post meridian, and then for all the public from five o'clock ante meridian until seven o'clock post meridian, and, lastly, for all the public at all times.

2. No part of any road or roads or of its or their appurtenances, constructed under the authority of this act, shall be used for advertising purposes, except that the person, firm or corporation operating such road or roads may use the structure for posting necessary information for the public relative to the running of trains and to the operation of the road or roads. Nor shall any trade, traffic or occupation, other than required for the operation of said road or roads, be permitted thereon or in the stations thereof, except such sale of newspapers and periodicals as may, from time to time, always with the right of revocation, be permitted by the [board of rapid transit railroad commissioners] *public service commission.*

§ [34-e] *31. Discretion of the commission.*—Nothing contained in this act shall be deemed, or be construed as intending to limit, or as limiting, in any manner, the discretion of the [board of rapid transit railroad commissioners] *public service commission*, provided in the opinion of the board of estimate and apportionment, or other analogous local authority of such city, it is expedient, practicable and in the public interest to do so, to enter into contracts for construction, equipment, maintenance and operation with the same person, firm or corporation, or for any one or more of said purposes with the same person, firm or corporation, or with different persons, firms or corporations, either

in one contract or in separate contracts, and at any time or times.

§ 14. Section thirty-four-f of said act is hereby amended to read as follows:

§ [34-f] *32. Acquiring rapid transit railways wholly or partly constructed.—1.* The public service commission of the first district, successor of the rapid transit railroad commissioners, may, with the approval of the board of estimate and apportionment, or other analogous local authority of such city, purchase for such price and upon such terms and conditions as may be agreed upon, and acquire by conveyance or grant to such city, to be delivered to said board, any line or lines of railway already constructed or in process of construction of the character which might be constructed as a rapid transit railway or railways under the provisions of this act, and which in the opinion of the board it is for the interest of the public and the city to acquire for rapid transit purposes. The moneys necessary to be paid for any such railway or railways so purchased, together with all expenses necessarily incurred in connection therewith, shall be raised and paid out of the proceeds of bonds issued and sold as provided in section thirty-seven of this act. Any such railway or railways so acquired shall be deemed to have been constructed for and at the expense of the city within the meaning of this act and the cost of acquiring the same shall be deemed and considered as the cost of such construction, in like manner as though said railway had been constructed pursuant to the provisions of this act.

2. Unless all the consents to the construction and operation of any such railway or railways so purchased required by article three, section eighteen, of the constitution shall have been obtained prior to such purchase, the board shall proceed to secure such consents as required by section five of this act. As soon as such consents shall have been obtained, the said board for and on behalf of said city may, with the approval of the board of estimate and apportionment or other analogous authority of such city, enter into a contract with any person, firm or corporation for the equipment of any railway purchased as aforesaid at the cost and expense of such contracting person, firm or corporation, and for the maintenance and operation of such railway or railways for a term of years to be specified in said contract not to exceed twenty-five years, with a covenant for one renewal of not to exceed twenty-five years. Every such contract shall contain such terms and conditions as to the rates of fare to be charged and the character of services to be furnished and the rental to be paid, or the terms upon which such railway or railways are to be operated, as the said public service commission of the first district, successor of the board of rapid transit railroad commissioners, shall deem to be best suited to the public interests and as the said board of estimate and apportionment or other analogous body shall approve.

§ 15. Said act is hereby amended by adding two new sections to be known as sections thirty-three and thirty-four, which new sections shall read as follows:

§ 33. *If or as soon as consents, where necessary, have been obtained for any rapid transit railroad which is an extension or a continuation in the same general direction of any existing rapid transit railroad, or any portion thereof, constructed wholly or in part at the public expense under the provisions of this act and wholly or in part in operation, and the plans and specifications have been prepared as provided in section six of this act, the said public service commission may with the approval of the board of estimate and apportionment or other analogous local authorities of such city, enter into a contract for construction at the public expense and for equipment, maintenance and operation of said railroad in either of the two following ways:*

1. With the person or corporation having the contract for the construction and operation of said existing rapid transit railroad by the terms of which the said proposed rapid transit railroad shall be constructed as extra work under the terms of the said existing contract either without expense to the city or for such sum of money as may be agreed upon to be paid by such city for or toward the construction thereof, the said railroad when completed to be subject to the terms and conditions of the said original contract except so far as shall be otherwise specified and agreed.

2. Under the provisions of sections twenty-six, twenty-seven and twenty-nine, so far as the same may be applicable, with the person or corporation operating such existing railroad as lessee thereof, in which case the contract for maintenance and operation of said proposed railroad shall be for a term of years to be specified in

said contract, which may be until but not beyond the date at which the original lease or contract for operation of such existing railroad, and any renewal of the term thereof, provided for in such contract, shall expire. The contract may provide for readjustment of the amount of any rental to be paid under such contract from time to time in the future to the end of the term at intervals of not more than twenty years, and prescribe a method of determining by arbitration or by the court the amount to be paid upon any readjustment thereof.

3. Every such contract for such construction, equipment, maintenance and operation of such proposed railroad made in either of the foregoing specified ways, shall also make provision that the city may, upon giving a specified notice, terminate the contract for equipment, maintenance and operation of any such proposed railroad at any time after the expiration of ten years from the date when operation of any part of such proposed railroad shall actually begin, but such right of termination of any such contract shall be upon condition as follows:

(1) That the equipment of the said proposed railroad suitable to and used for the purposes of such railroad as apportioned pursuant to the contract, shall be purchased and taken by the city at an amount which shall be ascertained as provided in the contract, but which shall not be greater than the actual cost of the same, plus fifteen per centum thereof, and such equipment shall upon such termination of said contract become and be the property of the city on paying to the contractor said amount.

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(2) Upon the further condition if such proposed railroad shall be constructed wholly or in part at the cost of the contractor that the city shall also pay to the contractor an amount for his investment in the construction of said proposed road, which shall not exceed the actual cost to the contractor of constructing said road, plus fifteen per centum thereof, and shall decrease under provisions of the contract as the term thereof continues so that at the end of the full term of the contract no such amount shall be paid.

The contract shall provide a method of ascertaining the amount to be paid for said equipment and for the contractor's investment in the construction of said proposed road upon a termination by the city of such contract and for the equipment of said proposed railroad at the end of the full term of the contract, and may provide for determining from time to time, in default of agreement, by arbitration or by the court, a valuation of the contractor's said investment in the construction of said proposed road and of the equipment or any part or portion of either thereof for any purpose under said contract. The contract shall also provide that upon the expiration of the term fixed in the contract, the contract shall end without compensation to the contractor except for equipment, and that such equipment shall became the property of the city upon payment to the contractor of an amount to be ascertained as provided in the contract.

4. The contract may also include a provision for modification of the lease or contract for equipment, maintenance and operation

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of said existing rapid transit railroad so that such last named lease or contract may be terminated by the city upon giving a specified notice at the same time and in connection with the termination of the contract as to such proposed railroad, but such right of termination of any such contract as to said existing rapid transit railroad shall be upon condition (1) that the equipment of the said railroad suitable to and used for the purposes of such contract shall be purchased and taken by the city at an amount which shall be ascertained as provided in the contract, but shall not be greater than the actual cost of the same plus fifteen per centum thereof, and such equipment shall, upon such termination of such contract become and be the property of the city on paying to the contractor such amount, and (2) upon the further condition, if said existing railroad shall have been constructed wholly or in part at the cost of the contractor, that the city shall also pay to the contractor or to his assignee in possession an amount for the investment in the construction of said existing road which shall not exceed the actual cost to the contractor of constructing such road, plus fifteen per centum thereof, and shall decrease under the provisions of the contract as the term thereof continues, so that at the end of the full term of the contract, and of any renewal thereof contained therein, no such amount shall be paid. The contract as so modified shall provide a method of ascertaining the amount to be paid for said equipment and for the contractor's investment in the construction of said road upon a termination by the city of said contract, and for the equipment of said existing railroad at the end of the full term of the contract; and may provide for de-

termining from time to time, in default of agreement, by arbitration or by the court, a valuation of the contractor's said investment in the construction of said road and of the equipment, or any part or portion of either thereof, for any purpose under said contract. The contract may also provide for assuring that in case a new contract for equipment, and for maintenance and operation of said existing rapid transit railroad, or proposed rapid transit railroad, is made after such termination, pursuant to notice, or after the expiration of the full term of such contract, that the title to and possession of the equipment so taken and the right to the possession of the railroad or railroads so constructed may be transferred directly to the new contractor upon his paying the amount so required.

§ 34. 1. Every grant or contract made under the provisions of this article, as part of which the city shall have a right to terminate any right or franchise or any contract for maintenance and operation of any railroad or railroads, shall provide that if at any time in ascertaining the amount to be paid by the city as a condition of such termination or at the expiration of the full term, it shall be necessary that a valuation of any plant, property, equipment, construction or any investment in any thereof, shall be determined, such valuation shall in default of agreement, be determined by arbitration or by the court. Every such grant or contract shall also make provision to assure supervision by the commission of all operations of said grantee or contractor in and about such enterprise and for keeping and for access to and exam-

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ination, use and production of any and all books, records and memoranda of such operations not only of the grantee or contractor but of any contractor, subcontractor, banker or person furnishing money, material or supplies directly or indirectly to such enterprise, to the extent that such books, records and memoranda have to do therewith, and for ascertaining the cost to the grantee or contractor and the value of any equipment, property or construction furnished or done pursuant to said grant or contract, including permanent additions to construction from time to time and for a method of determining the amount of such cost forthwith upon the furnishing or completion of the same by arbitration or by the court in default of an agreement upon the amount thereof, and the grant or contract may provide that if the amounts to be paid to the grantee or contractor upon any such termination shall not have been finally determined or paid prior to or at the time when the termination is under the said notice given to take effect the title to and right of possession of the property, and the right of possession of the said railroad may nevertheless pass to the city or to a new contractor, and that the city or such new contractor having given proper and sufficient sureties shall pay to the contractor the amount so determined, with interest from the time aforesaid.

2. Every grant or contract made under the provisions of this article by the terms of which the city in lieu of rental shall be entitled to a portion of income or increase derived from the enterprise shall make provisions for definition and determination from time

to time of the items to be included in operating expenses, taxes, payments to reserve and amortization funds and for the percentages or amounts to be set aside therefor and for interest upon construction cost. The commission shall prescribe in the grant or contract a period for amortization by the grantee or contractor of the actual cost of plant and property other than equipment, or actual cost to the contractor of the construction of such road, and the period so prescribed shall end with the term of the grant. Any and all sums of moneys hereafter received by the city from or under any grant or contract heretofore or hereafter made under the provisions of this act, over and above such sum or sums as are required by law to be paid into a sinking fund to meet the payment of interest or principal on city bonds issued for construction of any railroad pursuant to any such contract, shall be kept separate and apart from any and all other moneys of such city and paid into a fund to be known as the rapid transit fund, and shall be applied under the direction of the board of estimate and apportionment or other analogous local authority of such city only to or toward the construction of railroads, or the purchase of plant and property or equipment of railroads, pursuant to the provisions of this act, or to deficiencies in the operation or rental of railroads owned by the city, or in the operation of railroads owned and operated by the city, pursuant to this act.

3. Unless otherwise provided by law the commission with the approval of the board of estimate and apportionment, or other analogous local authority of such city, shall have and exercise the

powers, rights and privileges reserved or given to the city to terminate any right, privilege, franchise, authority or contract granted or entered into, or which may be exercised under the provisions of this act, and may do and perform any and all things requisite and necessary to any such termination.

§ 16. Sections thirty-five and thirty-six of said chapter, as heretofore amended, are hereby further amended to read as follows:

§ 35. *Equipment.* — The equipment to be supplied by the person, firm or corporation contracting for the equipment or any part thereof, of any such road shall include all such rolling stock, motors, boilers, engines, wires, ways, conduits and mechanisms, machinery, tools, implements and devices of every nature whatsoever used for the generation or transmission of motive power and including all power houses, and all apparatus and all devices for signaling and ventilation as may be required for the operation of such road and specified in the contract for such equipment.

§ 36. *Advertising for proposals.*—The said [board of rapid transit railroad commissioners] *public service commission* before awarding any contract or contracts shall advertise for proposals for such contracts by a notice to be printed [twice] *once* a week for [three] *two* successive weeks in no less than [four] *two* of the daily newspapers published in said city, and in such newspapers published elsewhere than in said city as said [board] *commission* shall determine. Such notice shall set forth and state the points within said city, between which said road or roads is or are to run, the general method of construction, the route or routes to be followed, the term of years for which it is proposed

to make such contract, and such other details and specifications as said [board] *commission* shall deem to be proper. Said notice shall state the time and place at which said proposals will be opened, and the said [board] *commission* shall attend at the time and place so specified, and shall publicly open all proposals that shall have been received, but the said [board] *commission* shall not be bound to accept any proposals so received, but may reject all such proposals and readvertise for proposals in the manner hereinbefore provided, or may accept any of such proposals as will, in the judgment of such [board] *commission*, best promote the public interest, and award a contract accordingly. *All such contracts must before execution be approved as to form by the corporation counsel, or other chief legal adviser of such city.*

§ 17. Section thirty-seven of said chapter, as heretofore amended, is hereby further amended to read as follows:

§ 37. *Issue of bonds by city. 1.* For the purpose of providing the necessary means for such construction, or equipment, or both, as the case may be, or acquiring by purchase, at the public expense, of any such road or roads, [including] *or of* galleries, ways, subways and tunnels for subsurface structures, and the necessary means to pay for lands, property, rights, terms, privileges and easements, whether of owners, abutting owners or others, which shall be acquired by the city for the purposes of the construction or the operation of such road or roads as hereinafter provided, and of meeting the interest on the bonds in this section hereinafter provided for accruing thereon prior to the completion and readiness for operation of the portion of such road or roads,

and the *said* galleries, ways, subways and tunnels for subsurface structures, for the purchase, construction, or equipment of which such bonds shall have been respectively issued, the board of estimate and apportionment, or other local authority in said city, in which such road or roads are to be constructed, having power to made appropriations of moneys to be raised by taxation therein, from time to time, and as the same shall be necessary, and upon the requisition of said [board of rapid transit railroad commissioners] *public service commission*, shall direct the comptroller, or other chief financial officer of said city, and it shall thereupon become his duty, to issue the bonds of said city at such a rate of interest, as the board of commissioners of the sinking fund of said city, if there be such a board, or if there be no such board, then as other local authority directing the issue of such bonds, may prescribe. Said bonds shall provide for the payment of the principal and interest in gold coin of the United States of America. They shall not be sold for less than the par value thereof, and the proceeds of the same shall be paid out and expended for the purposes for which the same are issued, upon vouchers certified by said [board of rapid transit railroad commissioners] *public service commission*. Said bonds shall be free from all taxation for city and county purposes, and shall be payable at maturity [out of the sinking fund for the payment of the city debt, if there be such a sinking fund of said city; but if there be no such sinking fund, then] out of a sinking fund to be established and created out of the annual rentals or revenues of said road, including galleries, ways, subways, or tun-

nels for subsurface structures, as hereinbefore provided. But this provision that the said bonds shall be payable out of such sinking fund shall not diminish or affect the obligation of said city as a debtor upon said bonds, or any other right or remedy of any holder or owner of any such bonds, to collect the principal or interest thereof.

2. The amount of bonds authorized to be issued and sold by this section shall not exceed the limit of amount which shall be prescribed by the board of estimate and apportionment or such other local authority having power to make appropriations of moneys to be raised by taxation; and no contract for the construction of such road or roads shall be made unless and until such board of estimate and apportionment or such other local authority shall have consented thereto and prescribed a limit to the amount of bonds available for the purposes of this section which shall be sufficient to meet the requirements of such contract in addition to all obligations theretofore incurred and to be satisfied from such bonds. Before finally fixing the terms and conditions of any contract for any of the purposes contained and set forth in this act, the [board of rapid transit railroad commissioners of the appropriate city] *public service commission* shall set a date or dates for a public hearing upon the proposed terms and conditions thereof, at which citizens shall be entitled to appear and be heard. No such hearing shall be held, however, until notice thereof shall have been published for at least two weeks immediately prior

thereto in the City Record, or other official publication of the city, and at least twice in two daily newspapers published in the city [, to be designated by the mayor]. It shall be the duty of the [board of rapid transit railroad commissioners] *commission* to cause [not less than five hundred] *as many* copies of a draft of the proposed contract to be printed at least two weeks in advance of such hearing *as may be necessary*. The said notice of such public hearing shall state where copies of such drafts may be obtained upon payment of a fee, to be fixed by said [board] *commission*, but not to exceed one dollar for each such copy. The [board] *commission* may, after the hearing to be held as above required, alter, modify or amend such draft contract in any manner in its discretion.

3. A rapid transit railroad to be owned by the city, and for the construction of which with public money in whole or in part a contract or contracts are authorized to be entered into as aforesaid, shall be a local improvement. The public service commission with the approval of the board of estimate and apportionment, or other such local authority, shall have power to determine whether all or any, and if any what, portion of the cost and expense necessary to be incurred for the construction of said road and for property to be acquired for such construction and for the operation of said road shall be assessed upon property benefited thereby, and such assessment or assessments shall be laid and confirmed and collected in accordance with and shall be in all respects subject to the provisions of the charter and laws respecting the levying, confirming

and collection of assessments for local improvements in such city, and in the city of New York in accordance with and subject to the provisions of chapter seventeen of the greater New York charter, except as otherwise hereinafter provided.

4. At any time after the consents have been obtained for any such rapid transit railroad and the detailed plans and specifications therefor have been prepared as hereinbefore authorized and directed, the public service commission may transmit to said board of estimate and apportionment, or other local authority of such city, an estimate of the cost and expense necessary to be incurred for the construction of said railroad and for property to be acquired for such construction and for the operation of said railroad, together with a statement which shall show (1) the proportion of said cost and expense stating the amount thereof in money which in the opinion of said commission should be assessed upon the property benefited; (2) the boundaries of the district or districts in said city upon which an assessment or assessments aggregating said amount should in the opinion of the commission be levied, and (3) the amount so to be levied in every such district. Thereupon the public service commission with the approval of the board of estimate and apportionment, or other such local authority of said city, shall have power to, and, if in their judgment the interest of the public so require, they shall after publishing a notice at least one week in advance in the City Record and in such other newspapers published in said city as said board of estimate and apportionment, or other local authority, shall designate as suf-

ficient, stating the time, place and subjects to be considered, and after a joint hearing, pursuant to such notice by and before said commission and said board or other authority, which may be adjourned from time to time, fix and determine the boundaries of the district or districts upon which said assessment or assessments shall be levied, the whole amount or proportion of any such cost and expense to be assessed upon property benefited by said improvement and the amount or proportion of such whole assessment to be levied in said district or districts respectively benefited by said improvement, and the decision of said public service commission, approved by the said board of estimate and apportionment or other such local authority, shall be final as to each matter so fixed and determined.

5. The public service commission shall thereupon certify to the board of assessors, or other analogous authority of such city having power to levy assessments for local improvements in said city, the amount or amounts of such cost and expense so directed to be assessed upon property benefited in each such district, and said board of assessors, or other such body shall thereupon proceed forthwith in the manner provided by law for levying assessments for local improvements in said city, save as otherwise herein specified, to levy and assess said amount or amounts upon the real property within said district or districts benefited thereby in proportion to the amount of such benefit, and shall not be limited in the levying of said assessment or assessments to one-half of the

fair value of any house or lot or improved or unimproved land.

6. The entire amount or amounts from time to time so assessed against any property benefited shall after confirmation and entry of each such assessment, with interest thereon at six per centum per annum, after sixty days from the entry of the same, as in the case of other assessments for local improvements levied in said city, be a lien upon the said property, but every separate assessment shall as to the payment thereof be so distributed that the payment of the amount so assessed with interest shall as to each parcel of property be made as follows, namely: One-tenth thereof within sixty days from the date of said entry, and the other nine-tenths of such assessment in nine installments as nearly equal in amount as may be, with said interest, in one, two, three, four, five, six, seven, eight and nine years respectively, from the date of entry of such assessment, but all installments not due may be paid at any time with interest to the date of payment. Provided, however, that if any such installments and interest thereon be not so paid within three years after such installment shall be due as aforesaid the parcel so assessed or the tax lien thereon shall be subject to advertisement and sale for the whole assessment then remaining at the end of three years unpaid, in the same manner as may be provided in the case of assessments for local improvements levied in said city.

7. In order to provide funds to meet the cost and expense of construction of said railroad and of acquiring any property neces-

sary for such construction or operation of said railroad in advance of the collection of such assessments, the comptroller or other chief financial officer of such city shall in addition to power to issue assessment bonds under the provisions of any law or charter of such city have also additional authority in lieu of issuing any such assessment bonds under said law or charter to issue and sell at not less than par on or after the date when any such assessment shall be confirmed and entered bonds which shall be known as rapid transit assessment bonds for the railroad designated as aforesaid. Such rapid transit assessment bonds shall not be issued or sold upon the faith or credit of the city, and the faith and credit of the city shall not be pledged nor shall the city be liable for the payment of any thereof, but such bonds shall be payable only out of the moneys derived from the collection of such assessments as the same shall be paid in. Such bonds shall be in such form as the said comptroller or other financial officer shall designate and shall be payable at not more than ten years and bear such rate of interest not exceeding six per centum per annum as the comptroller may fix, and shall be exempt from all taxation except for state purposes, shall be receivable in payment of any such assessments or installment thereof, and may be made redeemable after one year. In selling such rapid transit assessment bonds the comptroller may by the terms of sale or otherwise prescribe that payment to him therefor shall be made by the purchaser to whom any thereof shall be allotted in installments from time to time as the comptroller shall call for the same, and may provide for forfeiture

of the right to such bonds so allotted and any payments made thereon by the purchaser for non-payment of any such installment as so required. The comptroller may require such installments to be paid as the needs of the construction of said railroad, as certified to him by the commission, shall in his judgment require. The moneys derived from the sale of any bonds issued by said comptroller or chief financial officer in advance of the collection of any such assessments and the moneys derived from the collection of such assessments shall be kept separate and apart from all other funds of the said city and shall be known as the subway construction fund of such railroad, and the same shall be applied only to or toward the cost and expense of the construction of such railroad and acquiring of property necessary for the construction and operation of the same as aforesaid and to the retirement of said bonds issued in advance of the collection of said assessments.

8. Whenever the public service commission, with the approval of the board of estimate and apportionment or other analogous local authority of such city shall have determined that the cost and expense of construction of any railroad and acquisition of property for said railroad or any part of such cost and expense shall be assessed as aforesaid upon property benefited, and the assessment therefor shall have been confirmed and entered in pursuance of the provisions of this section, no contract for the construction of such railroad shall be made until the board of estimate and apportionment or such other local authority shall have consented

thereto and prescribed a limit to the amount of city bonds, if any, available for the purposes of said contract as hereinbefore provided and also until assessment bonds or rapid transit assessment bonds issued by the comptroller under the provisions of this section in advance of the collection of such assessment shall have been sold sufficient in amount when paid for to cover the proportion of the said cost and expense payable from assessments levied as aforesaid. Such contract for the construction of any such railroad shall provide that any sums of money payable thereunder to the contractor for or on account of construction of said road shall be made only from the moneys derived from said appropriation, if any, by said board of estimate and apportionment or other local authority of said city and from the collection of such assessments and interest thereon or bonds issued and sold as aforesaid in advance of the collection of said assessments, and that the city shall not be liable to any such contractor for any sum or sums so payable under said contract for or on account of construction of said railroad except to the extent of the appropriation, if any, made therefor as aforesaid by said board of estimate and apportionment or other such local authority.

9. In case the whole assessment so made hereunder or the money collected shall be in excess of the amount necessary to pay the said cost and expense or portion thereof for which such assessment is levied and assessed under the provisions of this section, the board of estimate and apportionment or other such local authority shall have power whenever the said cost and expense or portion thereof

and all bonds issued in advance of the collection of such assessment have been paid or whenever the accumulations of the said subway construction fund of such railroad are sufficient in its judgment to pay the said cost and expense or portion thereof and said bonds, to cancel any installment of such assessment not then due; and any such excess of moneys then or thereafter derived from collection of such assessments when ascertained and determined shall be apportioned, if necessary, between the several districts of assessment in the same proportion as such whole assessment was apportioned and shall be applied to or towards the reduction of any assessment at that time unpaid or shall be paid to the person or persons entitled thereto in proportion to the total amount assessed in such district or districts.

§ 18. Section thirty-eight of said act as heretofore amended is hereby further amended so that the same shall read as follows:

§ 38. *Modification of contracts.*—The [board of rapid transit railroad commissioners] *public service commission* for and on behalf of the said city in which such road or roads may be constructed, may, from time to time with the [concurrence of six members of said board and the] consent, in writing, of the bondsmen or sureties of the person, firm or corporation which has contracted *with said commission or its predecessors* to construct, equip, maintain or operate [said] *any* road or roads, [or any of them] agree with the said contracting person, firm or corporation upon changes in and modifications of said contract, or of the

plans and specifications upon which said road or roads is or are to be constructed, but no change or modifications in the plans and specifications consented to and authorized pursuant to section five of this act shall be made without the further consent and authorization provided for in said section; [but in no event shall the annual rental to be paid to said city, for the use of said road be reduced below the minimum rate hereinbefore provided.] *and by such modification provision may be made in the case of any contract existing at the date hereof that the city may, upon giving a specified notice, terminate such contract at any time after the expiration of ten years from the date of said modification upon condition that the equipment of the said railroad or railroads suitable to and used for the purposes of such contract shall be purchased and taken by the city at an amount which shall be provided for in the contract but which shall not be greater than the actual cost of the same plus fifteen per cent thereof, and if said railroad shall have been constructed wholly or in part at the cost of the contractor then upon the further condition that the city shall also pay to the contractor or to his assignee in possession and operating said railroad an amount for the contractor's investment in the construction of such road which shall not exceed the actual cost to the contractor of constructing such road plus fifteen per centum thereof, and shall decrease under the provisions of the said contract of modification as the term thereof continues thereafter so that at the end of the term of said contract and any renewal thereof contained therein no such amount shall be paid. The contract as so*

modified shall provide a method of ascertaining the amount to be paid for said equipment and for the contractor's investment in the construction of said road upon a termination by the city of such contract and for the equipment of such railroad at the end of the full term of the contract, and may provide for determining from time to time in default of agreement by arbitration or by the court a valuation of the contractor's said investment in the construction of said road and of the equipment or any part or portion of either thereof for any purpose under said contract.

The contract as so modified may also provide for assuring that in case a new contract for equipment and for maintenance and operation of said railroad is made after such termination pursuant to notice or upon the expiration of the full term of the contract, that the title to and possession of the equipment so taken and the right to the possession of the railroad so constructed may be transferred directly to the new contractor upon his paying the amount so required.

§ 19. Sections thirty-nine, forty, forty-one, forty-two, forty-three, forty-four, forty-five, forty-six, forty-seven, forty-eight, forty-nine, fifty, fifty-one, fifty-two, fifty-three, fifty-four, fifty-five, fifty-six, fifty-seven, fifty-eight, fifty-nine, sixty, sixty-one, sixty-two, sixty-three, sixty-four and sixty-five of said act, as heretofore amended, are hereby further amended so that the said sections shall read as follows:

§ 39. *Acquisition of property.— 1.* For the purpose of constructing or operating any road for the construction or operation

of which a contract shall have been made by the board of rapid transit railroad commissioners *or the public service commission*, including necessary stations and station approaches, or for the purpose of operating or securing the operation of the same free of interference and right of interference and of action and right of action for damages and otherwise, whether by abutting owners or others, or to provide, lay or maintain conduits, pipes, ways or other means for the transmission of electricity, steam, water, air or other source or means of power or of signals or of messages necessary or convenient for or in the construction or operation of such road, or for the transportation of materials necessary for such construction or operation, or to provide a temporary or permanent way or course for any such conduit, pipe or other means or source of transportation, said [board] *commission* for and in behalf of said city may acquire, by conveyance or grant to said city to be delivered to the said [board] *commission* and to contain such terms, conditions, provisos and limitations as the said [board] *commission* shall deem proper, or by condemnation or other legal or other proceedings, as in this act provided, any real estate and any rights, terms and interests therein, any and all rights, privileges, franchises and easements, whether of owners or abutters, or others to interfere with the construction or operation of such road or to recover damages therefor, which, in the opinion of the [board] *commission*, it shall be necessary to acquire or extinguish for the purpose of constructing and operating such road free of interference or right of interference.

2. The word "property" hereinafter used, shall be deemed to include any such real estate, and any rights, terms and interest therein, and any such rights, privileges, franchises and easements, whether of owners, abutting owners or others. Where any contractor for the construction or operation of such railroad shall require any property for such construction and operation, such property shall be deemed to be required for a public purpose; and with the approval of the [said board of rapid transit railroad commissioners] *public service commission* the same may be acquired by the said contractor in all respects as such property may be acquired by the [said board of rapid transit railroad commissioners] *public service commission* for the said city, and all proceedings to acquire the said property shall be conducted under the direction and subject to the approval of the [rapid transit railroad commissioners] *commission*. It shall be the duty of the [board] *commission* whenever any property which the city shall have acquired as provided in this act shall be unnecessary for rapid transit purposes, to sell and convey the same in behalf of said city, provided, however, that no such sale or conveyance shall be made except with the approval of the commissioners of the sinking fund of such city or, if there be no commissioners of the sinking fund, then the other board or public body thereof having power to sell or lease city property, and provided further that the proceeds of any such sale or conveyance shall, under the direction of the [said board of rapid transit railroad commissioners,] *public*

service commission, be applied either to the purchase of other property necessary for rapid transit purposes or shall be applied in all respects as the payments of rental to be made by the contractor as provided in this act.

3. Whenever the said rapid transit railroad commissioners *or the public service commission* for and in behalf of the city shall have acquired or shall hereafter acquire an easement in property by conveyance or grant for the purpose of the operation or construction of a rapid transit railroad, [it] *the commission* may in behalf of the city and as part consideration for the grant or conveyance of the easement, enter into an agreement with the grantor of such easement or right of way, giving to such grantor or his assigns, the right of lateral or other support through, in, or under the said property, or any adjoining lands or space occupied by said rapid transit railroad for any building erected or to be erected upon the land over which the easement or right of way has been obtained for the support and maintenance of any such building or buildings, provided that any structure that shall be built for the support of any such building or buildings shall be approved by said [board] *commission* and shall not extend in or under any street beyond the curb lines as fixed by the ordinances of the board of aldermen or other legislative body of such city.

§ 40. *Right of commission to enter upon property for purpose of survey; maps and plans to be filed.*—It shall and may be lawful for said [board] *commission*, and for all persons acting under its authority, to enter in the day time into and upon

any and all lands and property which it shall deem necessary to be acquired, or to which there may be appurtenant rights, terms, franchises, easements or privileges which it shall deem necessary to be acquired or extinguished by said city, for the purpose of making the maps or surveys hereinafter mentioned, and also to enter in like manner and for the same purpose upon any property adjacent to and within five hundred feet of the property to be so surveyed; and the [said board] *commission* shall cause three similar maps or plans to be made of each parcel of property which it may deem necessary so to be acquired, or to which there may be appurtenant rights, terms, franchises, easements or privileges necessary so to be acquired or extinguished, designating each of said parcels by a number, and upon each map or plan so made or in a memorandum accompanying the same and to be deemed part thereof the [said board] *commission* shall cause to be clearly indicated the particular estate or estates, rights, terms, privileges, franchises or easements to be acquired or extinguished for the purposes of this act, in relation to each and every piece or parcel of property described upon said map or plan. The [said board] *commission* shall have power to cause a triplicate set of maps or plans and memoranda as herein provided for to be made as often and at such times as said [board] *commission* shall determine, and each set of maps or plans and memoranda so made shall contain the particulars above enumerated within such district as said [board] *commission* shall in each case provide. The maps or plans and memoranda herein provided for, when approved and

adopted by said [board,] *commission*, shall have written thereon a certificate of such approval, signed by the members of said [board] *commission* adopting and approving the same, and one copy thereof shall be filed in the department of public works, or other chief executive department having principal charge of the streets, there to remain as a public record, and the other two of said maps or plans and memoranda shall be transmitted to the counsel to the corporation or other principal legal adviser of said city. The [said board] *commission* may from time to time make and file further maps or plans and memoranda amending those already filed, but not so as to defeat or impair any property or interest which shall have been already acquired, or to revive any interest or right which may have been already extinguished by the said city.

§ 41. *Corporation counsel to acquire property.*—Whenever and as often as the [said board] *commission* shall deem it to be necessary and proper that the said city should acquire any such property and shall have caused to be made, as provided in the last preceding section, the maps or plans and memoranda specifying and defining the said property to be acquired, or to which are appurtenant the rights, terms, franchises, easements or privileges to be acquired or extinguished, and shall have certified, filed and transmitted the several copies of such maps or plans as in the last section prescribed, the [said board] *commission* may direct the counsel to the corporation or other principal legal adviser of said city, to take legal proceedings to acquire the same for the

said city, and the said counsel to the corporation, or other principal legal adviser, shall thereupon take legal proceedings as in this act provided.

§ 42. *Disposition of maps.*—The said counsel to the corporation, or other principal legal adviser of said city, shall cause one of the maps or plans, so as aforesaid transmitted to him, to be filed in the office of the register of the county, or if there be no such register, then in the office of the county clerk of the county in which [said city] the property covered by said map is situated. The map, hereinafter denominated the third map, being the other one of the two so as aforesaid transmitted to said counsel to the corporation, or other legal adviser, shall be disposed of as hereinafter provided.

§ 43. *Petition.*—After the said set shall have been filed as hereinbefore provided in the office of the register or county clerk of said county, the said counsel to the corporation, or other principal legal adviser, for and on behalf of the said city, shall, and he may from time to time, upon first giving the notice required by the next section of this act, apply to the supreme court at any special [or general] term *or appellate division* thereof, to be held in the judicial district in which said [city] county is situated, for the appointment of commissioners of appraisal. Upon each such application he shall present to the court a petition, signed by a majority of the members of said [board] *commission* and verified in the manner prescribed by law for the

verification of pleadings, according to the practice of said court, setting forth the action or determination theretofore taken or had by said [board,] *commission*, with respect to the property to be acquired, and the filing of said maps or plans and memoranda, and praying for the appointment of such commissioners of appraisal. Such petition shall contain a general description of all the property to, or in or over or appurtenant to which any title, interest, right, franchise, easement, term, or privilege is sought to be acquired, or extinguished, and of every right, franchise, easement or privilege sought to be acquired by the said city for public purposes, each lot or parcel being more particularly described by a reference to the number of said lot or parcel as given on said map, and the title, interest, right, easement, term or privilege sought to be acquired, or extinguished, to or in or over or appurtenant to each of said lots or parcels shall be stated in said petition.

§ 44. *Notice of intention to make application.*—The said counsel to the corporation, or other principal legal adviser, shall give or cause to be given notice by publication in two public newspapers published in the said city, or, instead of such publication, may in his discretion cause service of the petition and notice of his intention to make application to the said court for the appointment of such commissioners of appraisal, to be made in the same manner prescribed by section three thousand three hundred and sixty-two of the code of civil procedure [as amended by chapter ninety-five of the laws of eighteen hundred and ninety,]; such notice if published as aforesaid shall state the time and place

of such application, shall briefly state the object of the application, and shall briefly describe the property sought to be acquired or affected, and refer to a fuller statement to be filed in the office of the [board of rapid transit railroad commissioners,] *public service commission*, in which shall be set forth the location and boundaries of the several lots or parcels of property, and rights, franchises, easements or privileges sought to be taken or affected, and a brief statement as to each of said lots or parcels, of the title, interest, rights, easements, terms or privileges therein or appurtenant thereto sought to be acquired or extinguished, with a reference to the dates and places of filing the said maps or plans and memoranda, shall be a sufficient description of the property sought to be so taken or affected. Such notice in case of publication as aforesaid shall be so published in said newspapers twice a week for [six] *two* weeks immediately previous to the time fixed in said notice for the presentation of each petition.

§ 45. *Order appointing commissioners of appraisal.*—At the time and place mentioned in said notice, unless the said court shall adjourn said application to a subsequent date, and in that event at the time to which the same may be adjourned, the court, upon due proof to its satisfaction of the publication aforesaid, and upon filing the said petition, shall make an order for the appointment of three disinterested freeholders, residents in said city, as commissioners of appraisal, to ascertain and appraise the compensation to be made to the owners of property so to be taken or extinguished for the purposes indicated in this act. Such order

shall fix the time and place for the first meeting of the commissioners.

§ 46. *Oath of commissioners.*—The said commissioners shall take and subscribe the oath required by the twelfth article of the constitution of the state of New York, and shall forthwith file the same in the office of the clerk of the county in which said city is situated.

§ 47. *Time when city becomes seized.*—On filing said oath in the manner provided in the last section, the said city shall be and become seized and possessed in fee or absolute ownership of all those parcels of property, rights, terms, franchises, easements and privileges which are in the maps or plans and memoranda referred to in section forty of this act, described as parcels of property, rights, franchises, easements, or privileges which are to be acquired, and also shall become seized and possessed of all the rights, terms, franchises, easements or privileges appurtenant to any lots or parcels of property indicated on said maps or plans as parcels in regard to which it is deemed necessary to acquire such rights, terms, franchises, easements or privileges, or the said rights, terms, franchises, easements or privileges shall be extinguished as the case may be; and the [said board] *public service commission* for the said city, may immediately or at any time or times thereafter take possession or enter into the enjoyment of the said property, rights, terms, franchises, easements and privileges or of any part or parts thereof without any suit or proceeding at law for that

purpose and the [said board] *commission* for the said city, or any person or persons acting under their or its authority, may enter upon and use, occupy, and enjoy in perpetuity all the parcels of property and all the rights, terms, franchises, easements, or privileges appurtenant to any of the parcels of property and all rights, franchises, easements, and privileges, described on said maps or plans or in said memoranda, for any of the purposes authorized and provided for by this act. But on such filing of the said oath the said city shall be and become forthwith liable to the respective owners of the several parcels of property and the several rights, terms, franchises, easements and privileges appertaining thereto, and of the said rights, franchises, easements, and privileges acquired as aforesaid, for the true and respective values thereof, together with interest thereon from the time of filing the said oath, provided, however, that no such interest shall be payable to any owner of any such property, right, term, franchise, easement or privilege during any period during which the said city or the [said board of rapid transit railroad commissioners] *commission* may by any resistance whether by legal proceedings or otherwise of such owner or with his authority, be prevented from taking possession thereof or enjoying the same; and provided further, that no action shall be brought to recover the amount of such value or interest unless within eighteen months after the filing of such oath, a report shall not have been duly made by commissioners of appraisal as herein provided, or

such report shall not have been confirmed by the supreme court as herein provided, so that the said city shall be liable to forthwith pay the amount by such report ascertained to be due for such value or interest.

§ 48. *Powers and duties of commissioners of appraisal.*—Any one of said commissioners of appraisal may issue subpœnas, and administer oaths to witnesses, and they or any one of them, in the absence of the others, may adjourn the proceedings, from time to time in their discretion, but they shall continue to meet from time to time as may be necessary to hear, consider and determine upon all claims which may be presented to them under any of the provisions of this act. In case of the death, resignation, refusal or neglect to serve of any commissioner of appraisal, the remaining commissioner or commissioners shall, upon ten days' notice to be given by advertisement in the newspapers mentioned in section forty-four of this act, apply to the supreme court, at a special [or general] term *or appellate division* thereof, to be held in the judicial district in which said city is situated, for the appointment of a commissioner or commissioners to fill the vacancy or vacancies so occasioned. In case of the death, resignation or refusal to serve of all the commissioners of appraisal, the said counsel to the corporation or other principal legal adviser to said city shall, on giving the notice required in this section, apply to the said court for the appointment of other commissioners of appraisal. It shall be the duty of the commissioners of appraisal to procure from the counsel to the cor-

poration or other principal legal adviser the third set of maps or plans and memoranda provided for in sections forty and forty-two of this act. They shall view the property laid down on said map, and shall hear the proofs and allegations of any owner, lessee or other person in any way entitled to or interested in the property to be acquired or extinguished, or any part or parcel thereof, and also such proofs and allegations as may be offered on behalf of the said city. They shall reduce the testimony, if any, taken before them to writing, and after the testimony is closed, they, or a majority of them, all having considered the same, and having an opportunity to be present, shall, without unnecessary delay, ascertain and determine the compensation which ought justly to be made by the said city to the owners or persons interested in the property acquired or extinguished by said proceedings. The said commissioners of appraisal shall make reports of their proceedings to the supreme court, as in the next section provided, with the minutes of the testimony taken before them, if any, and they shall be entitled to the payment hereinafter provided for their services and expenses, to be paid from the fund hereinafter specified. The said commissioners may make a single report or may make reports from time to time as they shall reach their several decisions as to different parcels of property.

§ 49. *Report of commissioners of appraisal.*—The said commissioners shall prepare a report or reports, to which shall be annexed the third set of maps or plans and memoranda referred

to in section forty-two of this act and therein denominated the third set or a copy there certified by them. Each said report shall contain a brief description of the property so taken or affected, with a reference to the map upon which the same is required to be indicated; a statement of the sums estimated and determined upon by them, as a just compensation for the same to be made by the city to the owners or persons interested therein and the names of such owners and persons; but in all and each and every case or cases where one or more of the owners and persons interested, or their respective estates or interests are unknown, or not fully known, to the commissioners of appraisal, it shall be sufficient for them to set forth and state in general terms the respective sums to be allowed and paid to the owners and persons interested therein, generally, without specifying the names or estates or interests of such owners or persons interested, or any or either of them.

§ 50. *Filing of report.*—Each said report, signed by said commissioners, or a majority of them, shall be filed in the office of the clerk of the county in which said city is situated, and the commissioners of appraisal shall, in each case, notify the counsel to the corporation, or other principal legal adviser to said city, as soon as such report is filed.

§51. *Notice of motion to confirm report.*—The counsel to the corporation, or other principal legal adviser, or, in case of his neglect to do so within ten days after receiving notice of such filing, then any person interested in the proceedings, shall give

notice that the said report will be presented for confirmation to the supreme court, at a special term thereof, to be held in the judicial district in which said city is situated, at a time and place to be specified in said notice. The said notice shall contain a statement of the time and place of the filing of the report, and shall be published in two daily newspapers published in such city, for at least two weeks immediately prior to the presentation of said report for confirmation.

§ 52. *Hearing and confirmation.*—The application for the confirmation of each such report shall be made to the supreme court at a special term thereof, held in the judicial district in which said city is situated. Upon the hearing of the application for the confirmation thereof, the said court shall confirm such report and make an order containing a recital of the substance of the proceedings in the matter of the appraisal, with a general description of the property appraised and for which compensation is to be made, and shall also direct to whom the money is to be paid, and whether or not any part thereof, and if so, what part, is to be deposited [with] by the comptroller or other chief financial officer of said city with the chamberlain of said city, or if there be no chamberlain, with a bank or trust company to be designated by said court. Such report when so confirmed shall, except in the case of an appeal, as hereinafter provided, be final and conclusive, as well upon the said city as upon owners and all persons inter-

ested in or entitled to said property, and also upon all other persons whomsoever.

§ 53. *Awards; actions for recovery.*—The said city shall, within four calendar months after the confirmation of any report of the commissioners of appraisal, pay to the respective owners and bodies politic or corporate mentioned or referred to in said report, in whose favor any sum or sums of money shall be estimated and reported by said commissioners, the respective sum or sums so estimated and reported in their favor respectively, with legal interest thereon from the date of filing the oath of said commissioners, and in case of neglect or default in the payment of the same within the time aforesaid, the respective person or persons or bodies politic or corporate, in whose favor the same shall be so reported, his, her or their executors, administrators, successors or assigns at any time or times after application first made by him, her or them, to the comptroller or other chief financial officer of said city for payment thereof, may sue for and recover the same, with lawful interest as aforesaid, and the costs of suit, in any proper form of action against the said city in any court having cognizance thereof, and in which it shall be sufficient to declare generally for so much money due to the plaintiff or plaintiffs therein by virtue of this act for property taken or extinguished for the purposes herein mentioned, and the report of said commissioners, with proof of the right and title of the plaintiff or plaintiffs to the sum or sums demanded, shall be conclusive evidence in such suit or action.

§54. *Payment of awards to city chamberlain in certain cases.* —Whenever the owner or owners, person or persons interested in any property taken or affected in such proceedings, or in whose favor any such sum or sums or compensation shall be so reported, shall be under the age of twenty-one years, or of unsound mind or absent from the city, and also in all cases where the name or names of the owner or owners, person or persons, interested in any such property shall not be set forth or mentioned in said report, or where the said owner or owners, person or persons, being named therein, can not, upon diligent inquiry, be found, or where there are adverse or conflicting claims to the money awarded as compensation, it shall be lawful for the said city to pay the sum or sums mentioned in said report, payable or that would be coming to such owner or owners, person or persons, respectively, with interest, as aforesaid, to the chamberlain of said city, or, if there be no chamberlain, then to any bank or trust company designated by the court in the order confirming the report of the commissioners of appraisal, to the credit of such owner or owners, person or persons, and such payment shall be as valid and effectual in all respects as if made to the said owner or owners, person or persons, interested therein, respectively, according to their just rights; and, provided, also, that in all and each and every such case and cases where any sum or sums or compensation reported by the commissioners in favor of any person or persons or parties whatsoever, whether

named or not named in said report, shall be paid to any person or persons, or party or parties, whomsoever, when the same shall of right belong and ought to have been paid to some other person or persons, or party or parties, it shall be lawful for the person or persons, or party or parties, to whom the same ought to have been paid, to sue for and recover the same, with lawful interest and costs of suit, as so much money had and received to his, her or their use by the person or persons, party or parties, respectively, to whom the same shall have been so paid.

§55. *Presentation of claims for compensation.*—Every owner or person in any way interested in any property taken or extinguished as contemplated in this act, if he intends to make claim for compensation for such taking or extinguishment, shall within six months after the appointment of the commissioners of appraisal exhibit to the said commissioners a statement of his claim, and shall thereupon be entitled to offer testimony and to be heard before them touching such claim and the compensation proper to be made to him, and to have a determination made by such commissioners of appraisal as to the amount of such compensation. Every person neglecting or refusing to present such claim within said time shall be deemed to have surrendered his claim for such compensation, except so far as he may be entitled, as such owner or person interested, to the whole or a part of the sum of money awarded by the commissioners of appraisal as a just compensation for taking or extinguishing the property owned by said person, or in which the said person is interested.

§ 56. *City protected.*—Payment of the compensation awarded by said commissioners of appraisal to the persons named in their report, if not infants or persons of unsound mind, shall, in the absence of notice to the said city or other claimants to such award, protect the said city.

§ 57. *Reports on specified claims.*—Said commissioners of appraisal may in their discretion take up any specified claim or claims, and finally ascertain and determine the compensation to be made thereon, and make a separate report with reference thereto, annexing to said report a copy of so much of the set of maps or plans and memoranda referred to in section forty-two of this act as indicates the property so reported on. Such report shall, as to claims therein specified, be the report required in this act, and the subsequent action with reference thereto, shall be had in the same manner as though no other claim were embraced in said proceeding, which, however, shall continue as to all claims upon which no such determination and report is made.

§ 58. *Appeals; new appraisals.*—Within twenty days after notice of the confirmation of the report of the commissioners, as provided for in section fifty-two of this act, which notice may, as to parties who have not appeared before the commissioners, be given in the manner provided in section fifty-one of this act, either party may appeal to the [general term] *appellate division* of the supreme court in the department in which such commissioners were appointed, from the appraisal and report of the commission-

ers and the order confirming the same. Such appeal shall be heard upon due notice thereof being given, according to the rules and practice of said court. On the hearing of such appeal the court may direct a new appraisal and determination of any question passed upon, by the same or new commissioners, in its discretion, and from any determination of the [general term] *appellate division* either party, if aggrieved, may take an appeal, which shall be heard and determined by the court of appeals. In the case of a new appraisal the second report shall be final and conclusive on all the parties and persons interested. If the amount of compensation to be made by such city is increased by the second report, the difference shall be paid by the comptroller or other chief financial officer of said city, to the parties entitled to the same, or shall be deposited with the chamberlain, or bank or trust company, as the court may direct, and if the amount is diminished the difference shall be refunded to the said city by the party to whom the same may have been paid, and judgment therefor may be rendered by the court on the filing of the second report against the party liable to pay the same. But the taking of an appeal by any person or persons shall not operate to stay the proceedings under this act except as to the particular property with which the said appeal is concerned. Such appeal shall be heard upon the evidence taken before said commissioners, and any affidavits as to irregularities, and three printed copies of such evidence shall be furnished by the said city to the party taking the appeal, within ten days after the appeal is perfected, and such

appeal may be heard on the evidence so furnished, and may be taken without security thereon.

§ 59. *Amendment of proceedings; removal of commissioners of appraisal.*—The supreme court in the judicial district in which said city is situated shall have power at any time to amend any defect or informality in any of the special proceedings authorized by this act as may be necessary, and to direct such further notices to be given to any party in interest at it deems proper, and also to appoint other commissioners in place of any who shall die, or refuse or neglect to serve or be incapable or serving or be removed. And the said court may at any time remove any commissioner of appraisal who in its judgment shall be incapable of serving, or who shall for any reason in its judgment be an unfit person to serve as such commissioner. The cause of such removal shall be specified in the order making the same. If in any particular it shall at any time be found necessary to amend any pleading or proceeding or to supply any defect therein arising in the course of any special proceeding authorized by this act, the same may be amended or supplied in such manner as shall be directed by the supreme court, which is hereby authorized to make such amendment or correction. [Wherever in this act reference is made to the general term of the supreme court, it shall be deemed to include the appellate division of the supreme court for the district in which said city is situated, whenever said general term shall be superseded thereby.]

§ 60. *Property deemed acquired for public use.*—All property acquired under the provisions of this act shall be and shall be deemed to have been acquired for public uses and purposes, and for the purpose of affording increased facilities for rapid transit between points within the city acquiring such property.

§ 61. *Cost of acquiring property payable from proceeds of bonds.*—The moneys necessary and sufficient to be paid for any property, acquired in any manner under the provisions of this act, together with all expenses necessarily incurred in surveying, locating and acquiring title to such property, and for surveying and locating the same, and for preparing the necessary maps and plans in connection therewith, shall be raised and paid out of the proceeds of bonds issued and sold as provided by section thirty-seven of this act, and all such expenses so incurred in surveying, locating and acquiring title, and for preparing necessary maps and plans and also those incurred as provided in the next section shall be deemed a part of and included in the cost of constructing the road or roads, the construction of which rendered it necessary to acquire the property in the course of the acquisition of which such expenses may be incurred.

§ 62. *Payment of commissioners of appraisal.*—The commissioners of appraisal appointed in pursuance of this article shall receive as compensation the sum of ten dollars per day for each day actually employed. [They may employ the necessary clerks, stenographers and surveyors.] The *corporation* counsel [to the corporation] or other principal legal adviser to said city shall

either in person or by such counsel as he shall designate for the purpose, appear for and protect the interests of the city in all such proceedings in court and before the commissioners. *The corporation counsel shall designate assistants to act as clerks to the commissioners of appraisal in all such proceedings without compensation therefor other than their salaries, and shall furnish to the commissioners of appraisal in each proceeding suitable offices and all the assistance which they may require in conducting their proceedings and preparing their reports for presentation to the supreme court for confirmation.* The fees of the commissioners [and the salaries and compensation of their employees,] and all other necessary expenses in and about the said proceedings provided for by this act and such allowance for counsel fees as may be made by order of the court, and all reasonable expenses incurred by said *corporation* counsel [to the corporation], or other principal legal adviser of said counsel designated by him for the proper presentation and defense of the interests of said city before said commissioners and in court, shall be paid by the comptroller or other chief financial officer of said city out of the funds referred to in the last preceding section. But such fees and expenses shall not be paid until they have been taxed before a justice of the supreme court in the judicial district in which said city is situated upon five days' notice to the *corporation* counsel [to the corporation], or other chief legal adviser of said city. Such allowance shall in no case exceed the limits prescribed by

section thirty-two hundred and fifty-three of the code of civil procedure.

§ 63. *Proviso in case road constructed by city.*—[In case it shall be determined by vote of the people as provided by sections twelve and thirteen of chapter seven hundred and fifty-two of the laws of eighteen hundred and ninety-four to construct by and at the city's expense] *Any railroad or railroads,* [then and in that event the road or roads] so constructed *by and at the city's expense* shall be and remain the absolute property of the city so constructing it or them, and shall be and be deemed to be a part of the public streets and highways of said city, to be used and enjoyed by the public upon the payment of such fares and tolls, and subject to such reasonable rules and regulations as may be imposed and provided for by the borad of rapid transit railroad commissioners in said city, *or by the public service commission.*

§ 64. *Construction of article.*—This act shall not be construed to repeal or in any manner affect chapter six hundred and six of the laws of eighteen hundred and seventy-five, entitled "An act to further provide for the construction and operation of a steam railway or railways in the counties of this state," or the acts amendatory thereof or supplementary thereto, or article five of five hundred and sixty-five of the laws of eighteen hundred and ninety, known as the railroad law, except so far as the said acts, or either of them, would, if this act had not been passed, authorize the appointment hereafter of any commissioners applied for as provided in section one of said act of eighteen hundred and ser-

enty-five, or in section one hundred and twenty of said act of eighteen hundred and ninety, in any city or cities containing a population of over one million inhabitants, according to the last preceding national or state census, or authorize any commissioners already appointed pursuant to the provisions of such act or acts in any such city or cities, to fix, determine or locate any new route or routes, pursuant to the provisions of either of said acts. This act shall not be construed in any manner to affect the exercise or enjoyment at any time, and from time to time hereafter, of any right or rights heretofore acquired, exercised or enjoyed by any corporation heretofore duly incorporated and organized or deriving powers and rights under the laws of this state. This act shall not affect or impair the exercise or enjoyment of any right or rights now possessed or heretofore acquired or heretofore authorized to be acquired, exercised or enjoyed by any street surface railroad corporation, except as herein otherwise expressly provided, and this act shall not be construed to repeal or in any manner affect chapter one hundred and forty of the laws of eighteen hundred and fifty, entitled "An act to authorize the formation of railroad corporations, and to regulate the same," or either of the several acts amendatory thereof or supplementary thereto. This act shall not be construed to repeal or in any manner affect chapter five hundred and sixty-five of the laws of eighteen hundred and ninety, known as the railroad law, except as hereinabove expressly provided, or except so far as the provisions of the same conflict with the provisions of this act. But nothing in this section contained

shall prevent the [board of rapid transit railroad commissioners] *public service commission* from laying out a route for a [railway] *railroad* and constructing and operating a [railway] *railroad*, and such [board] *commission* shall have the right to lay out such route and construct and operate such [railway] *railroad* over, under, along or across any street in, along, under or over which there shall be any existing [railway] *railroad*, provided that the routes so laid out by the [said board] *commission* and the [railway] *railroad* so constructed by it shall so pass over or under or at the side of such existing [railway] *railroad* as not to interfere with its operation.

§ 65. *Repealing clause.*—All acts and parts of acts, local or general, inconsistent with this act are hereby repealed.

§ 20. This act shall take effect immediately.

Became a law with the approval of the Governor as Chapter 226 of the Laws of 1912.

State of New York.

3d Rdg. 710. Nos. 1277, 1400, 1505 Int. 1118.

IN SENATE,

March 18, 1912.

Introduced by Mr. WAGNER—read twice, and by unanimous consent, the rule was suspended, and said bill ordered to a third reading and printed, and referred to the Committee on Affairs of Cities, retaining place in the order of third reading—amended and ordered reprinted as amended, and when printed to be recommitted to said committee—reported favorably from said committee with amendments, by unanimous consent the rules were suspended and said bill restored to third reading, amended, and to be reprinted as amended, emergency message.

AN ACT

To amend chapter four of the laws of eighteen hundred and ninety-one, entitled "An act to provide for rapid transit railways in cities of over one million inhabitants," generally.

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

Section 1. Section four of chapter four of the laws of eighteen hundred and ninety-one, entitled "An act to provide for rapid transit railways in cities of over one million inhabitants," as amended by chapter four hundred and ninety-eight of the laws of nineteen hundred and nine, and by chapter five hundred and five of the laws of nineteen hundred and ten, is hereby amended to read as follows:

EXPLANATION—Matter in *italics* is new; matter in brackets [ ] is old law to be omitted.

§ 4. Public service commission to determine necessity for railroads; routes; plan; consents; parks and streets excepted.

(1) The public service commission of the first district upon its own motion may proceed, from time to time, to consider and determine whether it is for the interest of the public and of a city having over one million of inhabitants, according to the last preceding national or state census, that a rapid transit railroad or railroads for the conveyance and transportation of persons and property should be established therein, and upon the request in writing of the local authorities of any such city at any time, the said commission shall proceed forthwith to consider and determine the same questions, and in each case the said commission shall conduct such an inquest and investigation as may be deemed necessary in the premises. If, after any such consideration and inquest, the said commission shall determine that a rapid transit railroad or railroads, in addition to any already existing, authorized or proposed, are necessary for the interest of the public, and such city, it shall proceed to determine and establish the route or routes thereof and the general plan of construction. Such general plan shall show the general mode of operation and contain such details as to manner of construction as may be necessary to show the extent to which any street, avenue or other public place is to be encroached upon and the property abutting thereon affected. The commission, from time to time, may locate the route or routes of such railroad or railroads over, under, upon, through and across any streets, avenues, bridges, viaducts, rivers, waters and lands

within such city, including blocks between streets or avenues, or partly over, under, upon, through and across any streets, avenues, bridges, viaducts, and lands within such city and partly through blocks between streets or avenues; provided that the consent of the owners of one-half in value of the property bounded on and the consent also of the local authorities having control of that portion of a street, bridge, viaduct, or highway, upon which it is proposed to construct or operate such railroad or railroads be first obtained, or in case the consent of such property owners can not be obtained, that the determination of three commissioners appointed by the appellate division of the supreme court in the department of the proposed construction, given after due hearing of all parties interested, and confirmed by the court, that such railroad or railroads ought to be constructed or operated, be taken in lieu of the consent of such property owners; except that no public park nor any lands or places, lawfully set apart for, or occupied by, and public building of any city or county, or of the state of New York, or of the United States, nor those portions of Grand, Classon, Franklin avenues and Downing street in the borough of Brooklyn, city of New York, lying between the southerly line of Lexington avenue and northerly line of Atlantic avenue, nor that portion of Classon avenue in said borough lying between the northerly line of Lexington avenue and southerly line of Park avenue, nor that portion of Washington avenue in said borough lying between Park and Atlantic avenues, nor that portion of Nostrand avenue in said borough lying northerly of the northerly line of Eastern parkway,

nor Debevoise place, Irving place and Lefferts place, Lee avenue, Waverly avenue, Vanderbilt avenue and Clinton avenue in said borough of Brooklyn, nor that portion of the city of Buffalo lying between Michigan and Main streets, nor any part of Fifth avenue, in the borough of Manhattan, city of New York, nor that portion of any street or avenue which is now actually occupied by any elevated railroad structure, shall be occupied by any corporation for the purpose of constructing a railroad in or upon any of such public parks, lands or places, or upon or along either of the said excepted streets or avenues. It shall be lawful for said commissioners to locate the route of a railroad or railroads by tunnel under any such public parks, lands, places, rivers or waters and to locate the route of any railroad to be built, under this act, across any of the streets and avenues now occupied by an elevated railroad structure in the city of New York, or across any of the streets or avenues excepted in this act at any point at which, in its discretion, the public service commission may deem necessary in the location of any route or routes, or under, or under and along, any of the said streets or avenues now so occupied or so excepted in this act. Nothing in this act shall authorize the construction of an elevated railroad on Broadway south of Thirty-third street, nor on Madison avenue in the borough of Manhattan, city of New York. It shall not be lawful to grant, use or occupy, for the purposes of an elevated railroad, except for the purpose of crossing the same, any portion of the following named streets and places in the borough of Manhattan, city of New York, that is to say:

Second avenue, below Twenty-third street; Fourteenth street, between the easterly line or side of Seventh avenue, and the westerly side of Fourth avenue; nor Eleventh street, west of Seventh avenue, nor any part of Bank street; Nassau street; Printing House square, so called, south of Franklin street; Park row, south of Tryon row; Broad street and Wall street.

2. The provisions of the said section four of the said act shall, with reference to any rapid transit railroad for which routes and a general plan have been heretofore adopted by the board of rapid transit railroad commissioners of any city, and for the municipal construction of which a contract has been heretofore made by any city, be deemed to have been in full force as hereby amended from before the time when the routes and general plan for which such railroad or railroads were so adopted by the board of rapid transit railroad commissioners.

§ 2. Section ten of said chapter, as amended by chapter four hundred and ninety-eight of the laws of nineteen hundred and nine, is hereby amended to read as follows:

§ 10. Appropriation for commission; audit and payment of expenditures; bonds. The board of estimate and apportionment or other board or public body on which is imposed the duty, and in which is vested the power, of making appropriations of public moneys for the purposes of the city government in any city in which it is proposed to construct such railroad or railroads shall, from time to time, on requisition duly made by the public service

commission, appropriate such sum or sums of money as may be requisite and necessary to properly enable it to do and perform, or cause to be done and performed, the duties herein prescribed, and such appropriation shall be made forthwith upon presentation of a requisition from the public service commission, which shall state the purposes for which such moneys are required by the commission. In case the said board of estimate and apportionment or such other board or public body fail to appropriate such amount as the public service commission deem requisite and necessary, the commission may apply to the appellate division of the supreme court, in the department in which the railroad is to be or has been constructed, on notice to the board of estimate and apportionment, or such other board or public body aforesaid, to determine what amount shall be appropriated for the purposes required by this section, and the decision of said appellate division shall be final and conclusive; and no city shall be liable for any indebtedness incurred by the commission in excess of such appropriation or appropriations. It shall be the duty of the auditor and comptroller of any such city, after such appropriations shall have been duly made, to audit and pay the proper expenditures of said commission upon vouchers therefor, to be furnished by the said commission, which payments shall be made in like manner as payments are now made by the auditor, comptroller, or other public officers, of claims against and demands upon such city; and for the purpose of providing funds with which to pay the said sums, the

comptroller or other chief financial officer of said city is hereby authorized and directed to issue and sell revenue bonds of such city in anticipation of receipt of taxes, and out of the proceeds of such bonds to make the payments in this section required to be made. The amount necessary to pay the principal and interest of such bonds shall be included in the estimates of moneys necessary to be raised by taxation to carry on the business of said city, and shall be made a part of the tax levy for the year next following the year in which such appropriations are made. *If the said commission shall determine that part of its expenses shall be included in determining the cost of construction of a railroad constructed under sections twenty-six, twenty-seven, twenty-nine or thirty-three of this act, then and in that event the said board of estimate and apportionment or other board or public body upon the requisition of the commission duly made may appropriate such sum or sums of money as may be requisite and necessary for such part of its expenses and authorize the issue of corporate stock for such purposes, and it shall thereupon become the duty of the comptroller of said city to issue and sell corporate stock of the city for such purposes.*

§ 3. Subdivision one of section twenty-four of said chapter as amended by chapter four hundred and ninety-eight of the laws of nineteen hundred and nine is hereby amended to read as follows:

1. The public service commission may also from time to time, with the approval of the board of estimate and apportionment, upon application of any person, firm or corporation owning, leas-

ing, constructing or actually operating *or having the right by contract to thereafter operate* a railroad wholly or in part within the limits of the city in which the commission has power to act, if in the judgment of said commission, the public interests so demand, fix and determine the route or routes by which any such person, firm or corporation may connect with other railroads, or the stations thereof, or with ferries *or bridges*, or may extend his or its lines *or lines which he or it operates or has the right to operate as aforesaid* within said city, *or upon the application of a corporation organized under the railroad law for any of the purposes specified in subdivision nine of section twenty-seven of this act, and agreeing to equip, maintain and operate or to procure to be equipped, maintained and operated any road or roads of the city in connection with any existing railroad of a railroad corporation and any extension or extensions thereof wholly within such city, on the basis of a division of income, earnings or profits as hereinafter provided, the commission may with like approval, if in the judgment of the commission the public interests so demand, fix and determine the route or routes by which such corporation may construct, maintain and operate such extension or extensions, and may, with like approval, authorize such corporation to construct, maintain and operate such extensions*, and may with like approval authorize any such person, firm or corporation to lay an additional track or tracks on, above, under or contiguous to a portion or the whole of the route or routes of his or its railroad or railroads within said city and to acquire terminal or other facilities neces-

sary for the accommodation of the traveling public on any street or place except the place known as Battery park on which said railroad shall be located; and may also with like approval authorize any such person, firm or corporation to lay his or its tracks and operate his or its railroad to any terminal or terminals within the said city, and to transport over the same passengers or freight or both, and to run over the same either passenger trains or freight trains or mixed trains; and the commission shall with like approval fix and determine the locations and plans of construction of the railroads upon such route or routes and of such tracks and facilities, the times within which they shall be respectively constructed, the compensation to be made therefor to the city by said person, firm or corporation, and such other terms, conditions and requirements as to the said boards may appear just and proper, provided, however, that every such determination, authorization and license shall be made upon the condition that such person, firm or corporation shall from the time of the commencement of the operation of any such railroad or track or tracks under such determination, authorization or license, annually pay to the said city a sum or rental *which may be a part or proportion of gross or net receipts*, and that the amount of such sum or rental for a period of not more than twenty-five years, beginning with such operation of [or] any such railroad, track or tracks, shall be prescribed by the commission in such determination, authorization and license, and that every such determination, authorization and

license shall provide for the readjustment of the amount of such sum or rental at the expiration of the period for which the same shall be so prescribed and for redajustment from time to time in the future, to the end of the period of renewal, if any, of the amount of such annual payment at intervals each of not more than twenty years[.]; *provided further, however, that such determination, authorization or license may provide that for the whole or any portion of the life of the grant in lieu of such annual rental the gross or net receipts derived from the operation of such railroad owned, operated or to be operated by the said person, firm or corporation within the limits of said city, and from the operation of such connecting or extending route or routes, additional track or tracks or facilities may be combined, and that the city may receive as such compensation at intervals named a specified part or proportion of the income, earnings or profits of the railroad, and the route or routes, additional track or tracks or facilities whose receipts are so combined or of those and any other railroads which may be operated in connection therewith in like manner, which part or proportion may be deferred to a previous distribution to said person, firm or corporation, which distribution may be cumulative, and in such case such determination, authorization or license may apportion out of the amount so to be received by the city and shall specify a portion thereof which shall be deemed to be the rental for the use of such route or routes, additional track or tracks or facilities, and shall also provide for determining the amount of the income, earnings or profits of the rail-*

road within the limits of the city and of the route or routes, additional track or tracks or facilities whose receipts are so combined and may provide for readjustment of the proportion which the city shall receive or of the portion thereof which shall be deemed to be the rental for the use of said route or routes, additional track or tracks or facilities at specified intervals, and may prescribe a method of determining by arbitration or by the court the amount which the city shall receive as its proportion of such income, earnings or profits or as such rental upon any such readjustment thereof. Such determination, authorization or license shall contain a reservation to the city of the privilege, upon giving a specified notice, to terminate the franchise, right or authority granted under this section *as to all, and if deemed advisable as to any specified portion or portions of such route or routes, additional track or tracks or facilities,* and to purchase and take the plant and property as defined in the grant at any time after the expiration of ten years from the date when operation of any part *of said route or routes, additional track or tracks or facilities or of such specified portion* thereof shall actually begin, upon paying an amount for said plan and property as property, excluding any value for the franchise, right or authority, which amount shall not exceed actual cost *as defined in the grant* of said plant and property plus fifteen per cent. thereof and shall decrease under provisions of the grant as the franchise continues, so that at the end of the full term of the grant or at the end of a period specified therein, no amount shall be paid except for *betterments,*

additions, improvements and additional equipment as hereinafter provided. The grant shall provide a method of ascertaining the amount to be paid for said plant and property on termination by the city of the said franchise, right or authority and for the *betterments, additions, improvements and additional* equipment at the end of the full term of the grant, and may provide for determining from time to time in default of agreement by arbitration or by the court a valuation of such plant and property or any part or portion thereof for any purpose under such grant. Such determination, authorization or license may also make suitable provision to the end that if the city shall after so terminating such franchise, right or authority or at the end of the full term of the grant propose to give a new franchise, right or authority in the enjoyment of which said plant and property or any part thereof may be utilized, the title to and possession of said plant and property or any part thereof may be transferred directly to the grantee of any such new franchise, right or authority when the said new grantee shall pay the amount so required[.]; *provided, however, that in the case of additional track or tracks added to any existing elevated rapid transit railroad, the determination, authorization or license may provide that said privilege of the city to terminate the franchise, right or authority therefor and to purchase and take the plant and property shall not be for railroad transit operation either by the city or by any other party, and shall be without prejudice to the rights of the said person, firm or corporation in the lines of said existing elevated railroad, and*

may make adequate provision for the protection of such rights. The commission may with like approval authorize the relocation of any existing tracks, structures, stations and appurtenances of such person, firm or corporation in any street or avenue in which the same now exist, such relocated structure to be held under all the terms and privileges of the original franchise.

§ 4. Subdivision six of section twenty-four of said chapter, as amended by chapter four hundred and ninety-eight of the laws of nineteen hundred and nine, is hereby amended to read as follows:

6. Every such certificate granting any franchise, right or authority, as aforesaid, except for additional track or tracks added to any existing elevated rapid transit railroad shall provide that upon the expiration of a period fixed therein the franchise shall end and that upon such termination thereof all the rights and property of the grantee in the streets, avenues, parkways, highways and public places shall cease and terminate without compensation and shall further provide that upon such expiration of such franchise, right or authority the plant and *property* [structure] together with the appurtenances thereto, of the grantee, constructed pursuant to such certificate, except *betterments, additions, improvements and additional* equipment as defined in the grant, shall become the property of the city without further or other compensation to the grantee; and that such *betterments, additions, improvements and additional* equipment shall be and become the

property of the city on paying the grantee the amount ascertained as provided pursuant to said certificate. The provisions of this section shall apply to any railroad or railroads constructed, constructing or contracted for under the provisions of section twenty-six of this act and to any person, firm or corporation constructing or operating such railroad or railroads.

§ 5. Subdivision two of section twenty-six of said chapter, as amended by chapter four hundred and ninety-eight of the laws of nineteen hundred and nine, is hereby amended to read as follows:

2. As soon as such consents, where necessary, shall have been obtained for any rapid transit railroad or railroads and the detailed plans and specifications have been prepared as provided in section six of this act, the said commission, for and in behalf of said city, may enter into a contract or contracts with any person or persons, firm or firms, or corporation or corporations, which in the opinion of said commission shall be best qualified to fulfill and carry out said contract or contracts for the construction of such road or roads, including such galleries, ways, subways and tunnels, for subsurface structures as said commission may include in the plans for such road or roads under the authority of section six of this act[:], upon the routes and in accordance with the plans and specifications so adopted, for such sum or sums of money, to be raised and paid out of the treasury of said city, as hereinafter provided, *or to be contributed in part or in whole for the construction of such road or roads by the contractor having the contract for the equipment and operation of such road or roads*

as a consideration for the making of such contract for equipment and operation as hereinafter provided. [and on s]*Such contract for construction shall contain such* terms and conditions, not inconsistent with the aforesaid plans and specifications, as said commission shall determine to be best for the public interests. The sum or sums of money to be paid for the construction of such road or roads shall be separately stated in the contract or contracts from the sum or sums to be paid for any galleries, ways, subways or tunnels for subsurface structures, the construction of which is provided for in such contract or contracts. And said commission may in any case contract for the construction of the whole road, or all the roads provided for by the aforesaid plans in a single contract, or may by separate contracts, executed from time to time, or at the same time, with one or more such persons, firms or corporations, provide for the construction of a part or parts of said road or roads or for the construction at first of two or more tracks over a part or parts of such road or roads and afterwards of one or more additional tracks over a part or parts of such road or roads as the necessities of said city and the increase of its population or the advantageous and economical performance of the work may in the judgment of said commission require; or the said commission may in its discretion by separate contracts executed from time to time or at the same time contract with one or more persons, firms or corporations for the performance of any kind or kinds of work or any portion or portions of the work or for the furnishing of any material or material or

for the performance of any labor necessary for or incidental to the construction of the said road or roads or any part or parts thereof.

§ 6. Subdivision one of section twenty-seven of said chapter as amended by chapter four hundred and ninety-eight of the laws of nineteen hundred and nine is hereby amended to read as follows:

1. The public service commission shall, subject to the approval of the board of estimate and apportionment, or other analogous local authority of such city, have full power and authority to provide for the maintenance, supervision, care and operation of the railroad or railroads and also of the aforesaid galleries, ways, subways and tunnels for subsurface structures and all other appurtenances, constructed or to be constructed for and at the expense of such city pursuant to the provisions of this chapter, and may, with like approval, enter into a contract with any person, firm or corporation, who or which in the opinion of said commission shall be best qualified to fulfill and carry out said contract, for the equipment, or any part thereof not provided for pursuant to the next preceding section of this act, of such road or roads, at his or its own cost and expense, and for the maintenance and operation of such road or roads for a term of years to be specified in said contract and not to exceed twenty years, or in lieu of such definite term *of twenty years* the contract may *be for a longer period to be fixed by the contract and such case it shall* provide that the city upon giving a specified notice shall have the right to terminate the contract for the equipment, maintenance and

operation of such road or roads *as to all and if deemed advisable as to any specified portion or portions thereof* at any time after the expiration of ten years from the date when operation of any part of such road or roads *or of such specified portion thereof* shall actually begin, but such right of termination shall be upon condition as follows:

(1.) *If the title to the equipment of said railroad or railroads shall not be vested in the city then* [T]that the equipment of said railroad or railroads *or portion thereof* suitable to and used for purposes of such contract shall be purchased and taken by the city at an amount which shall be ascertained as provided in the contract, but which shall not be greater than the actual cost of same plus fifteen per cent. thereof and such equipment shall upon such termination of such contract become and be the property of the city on paying to the contractor such amount, *or in case the title to the equipment of said railroad or railroads shall be vested in the city then that the city shall pay to the contractor an amount for his investment in the equipment of said railroad or railroads, or portion thereof, which shall not exceed the actual cost to the contractor of the equipment of said railroad or railroads or portion thereof, plus fifteen per cent. thereof, and shall decrease under the provisions of the contract as the term thereof continues so that at the end of the full term of the contract no such amount shall be paid except that if additional equipment shall be required and supplied after the railroad, or por-*

tion thereof, shall have been put in operation, and if the contract shall provide that title to such additional equipment shall vest in the city when supplied, then the city shall pay an amount for the contractor's investment in such additional equipment which amount shall not exceed the actual cost to the contractor of such additional equipment plus fifteen per centum thereof and shall diminish so that at the end of the full term of the contract the city shall be required to pay for such investment in additional equipment only such amount as shall be provided in such contract, and

(2.) Upon the further condition if said railroad shall be constructed wholly or in part at the cost of the contractor that the city shall also pay to the contractor an amount for his investment in the construction of said road *or portion thereof* which shall not exceed the actual cost to the contractor of constructing said road *or portion*, plus fifteen per cent. thereof, and shall decrease under provisions of the contract as the term thereof continues so that at the end of the full term of the contract no such amount shall be paid[.], *except that if betterments, additions or improvements shall be required by the commission or approved by the commission prior to the construction thereof and be constructed wholly or in part at the cost of the contractor, then that the city shall pay an amount for the contractor's investment in such betterments, additions or improvements which shall not exceed the actual cost to the contractor of constructing such betterments, additions or improvements plus fifteen per cent. thereof and which amount shall diminish so*

that at the end of the full term of the contract the city shall be required to pay for such investment in betterments, additions or improvements only such amount as shall be provided in the contract.

The contract shall provide a method of ascertaining the amount to be paid for said equipment and for the contractor's said investment in the construction of said road upon termination by the city of any such contract and for the equipment of such railroad at the end of the full term of the contract, and the contract may provide for determining from time to time in default of agreement by arbitration or by the court a valuation of the contractor's said investment in the construction of said road and of the equipment or any part or portion of either thereof for any purpose under said contract. *The contract may provide that the title to the equipment as well as to said road, shall vest in the city from the beginning and that the amount to be paid by the city for the contractor's investment in such equipment shall decrease as the term of the contract continues, so that at the end of the full term of the contract no amount shall be payable therefor except for additional equipment as aforesaid.*

The contract shall [also] provide that upon the expiration of a period fixed in the contract, the term of said contract shall end without compensation to the contractor except *as provided in the contract, for betterments, additions or improvements to any such railroads required to be made or approved by the commission prior to the construction thereof during the term of any such contract, and, if the title to the equpiment be not vested in the city,*

for equipment suitable to and [use] *used* for the purposes of said contract *to the amount if any ascertained as provided in the contract*, and that *in such event* said equipment shall become the property of the city upon payment to the contractor of the *said* amount [ascertained as provided in the contract.] *or, if the title to the equipment be vested in the city, then an amount for the contractor's investment in additional equipment for any such railroads to be ascertained as provided in the contract. The contract may also provide that the city in exercising the right so to terminate any contract shall for such compensation as may be reasonable and which shall be determined pursuant to the contract permit the contractor whose contract is so terminated or the assignee or lessor of the contractor to use the tracks, structure and line equipment of a portion of such road or roads when necessary or convenient to reach terminals, yards or other facilities of the contractor or such assignee or lessor then located thereon.* The contract may also provide for assuring that in case a new contract under this section for equipment and for maintenance and operation of such railroad or railroads is made after such termination pursuant to notice or after the expiration of the full term of the contract that the title to and possession of the equipment so taken and the right to the possession of the railroad so constructed may be transferred directly to the new contractor upon his paying the amount so required.

§ 7. Section twenty-seven of said chapter as amended by chapter four hundred and ninety-eight of the laws of nineteen hundred

and nine is hereby amended by inserting therein a new subdivision to read as follows:

2. If such contract be made with a railroad corporation organized for the purpose of maintaining and operating a railroad, including the equipment or any part thereof, constructed pursuant to the provisions of this chapter, and which has entered into a contract or contracts for the maintenance and operation of a railroad or railroads theretofore constructed in whole or in part at the expense of the city as in this act provided, and is engaged in the maintenance and operation of the same within such city, and if such contract shall make provision for the equipment, maintenance and operation of such road or roads of the city in connection with the said railroad or railroads theretofore constructed as aforesaid at the expense of the city, and for a single fare, the said corporation and the city may in such contract or by modification of an existing contract or contracts provide that the original term of any contract for operation of the said railroad or railroads theretofore constructed in whole or in part at the expense of the city, may be extended or reduced and any right to a renewal or renewals thereof may be abrogated or waived so that such term as extended or reduced shall become and be coterminous with the term for equipment, maintenance and operation of such road or roads of the city to be fixed in and by such contract; and that if the city shall elect to terminate the contract for equipment, maintenance and operation of such road or roads as to any line or portion thereof

which with a connecting line or portion of the said railroad theretofore constructed and then operated by such corporation shall make a continuous line, then the city may when so terminating such contract as to any such line or portion thereof, take over the said connecting line or portion thereof theretofore constructed in whole or in part at the public expense and then operated by the said railroad corporation and terminate the contract of such corporation as to the same, provided that in lieu of such connecting line or portion thereof so taken over the said corporation shall for the then unexpired term of the contract for operation of the railroad theretofore constructed have the right to maintain and operate without right of recapture by the city another line of road or portion thereof specified in such contract which with the said lines of the railroad theretofore constructed shall make a continuous line, and the contract shall in such case provide for adjustment between the city and the corporation of the difference in the value of the right to operate the lines or portions thereof so exchanged by agreement or arbitration or by the court and for payment of such difference between them. The city and the corporation may also in such contract provide that if the city shall under any provision of law terminate the contract for the maintenance and operation of the said road or roads of the city after the expiration of ten years from the date when operation of any part of such road or roads shall actually begin, the city may at any time after thirty-five years from said date terminate the said contract or contracts for the maintenance and operation of the railroad or railroads there-

tofore constructed at the public expense, and take over such railroads upon payment to said company of a sum not exceeding the then present worth of the unexpired portion of the term of said contracts to be ascertained as provided in such contract, which may provide that in default of agreement such sum may be determined by arbitration or by the court.

The contract between the city and such corporation may also provide that in consideration of the operation of the railroads specified or provided for in such contract and the said railroad or railroads theretofore constructed in whole or in part at public expense in connection with each other for a single fare, and of the payment by said company of moneys to be applied as hereinafter authorized to or toward the construction by the city of the road or roads to be maintained and operated under such contract, and in further consideration of any covenants or agreements by the company to modify the term or terms of its leases or to waive or modify any of the other provisions of its contract or contracts, the gross receipts of the operation of such railroads theretofore constructed and of such road or roads of the city to be maintained and operated under such contract may be combined during the term of such contract, and that the city shall receive for the use of its said additional road or roads at intervals named a specified part or proportion of the income, earnings or profits of the railroads whose receipts are so combined, and in such case the contract may apportion out of the amount so to be received by the city and specify a portion thereof which shall be deemed to be the rental for the use

of each of the roads of the city maintained, equipped and operated under said contract. Any such contract shall provide for determining the amount of income, earnings or profits of the railroads whose gross earnings are so combined, and for such considerations may authorize the retention by the said railroad corporation for each year of the term of such contract, prior to the payment of any sums or of any part or portion of the income, earnings or profits to the city as rental for the use of the roads specified or provided for in such contract, of (a) a specified sum of money, which sum may represent the average annual income from operation of the said railroad or railroads theretofore constructed and operated by such corporation for any two or more years; (b) a sum not exceeding six per centum per annum for each year upon the investment of the said company including brokerage charges not exceeding three per centum, in the construction and equipment of the said road or roads of the city to be maintained and operated under such contract; and (c) a sum not exceeding the annual expense or cost to the contractor plus one per centum per annum on account of the contractor's investment in betterments or improvements upon or additions to such road or roads and equipment. Such contract may also provide that such annual payments shall be cumulative, and that any deficiency with respect thereto shall be paid off and discharged annually out of the said gross receipts before any payments by way of rental or compensation for the use of such roads shall be made to the city.

§ 8. Subdivision two of section twenty-seven of said chapter, as

amended by chapter four hundred and ninety-eight of the laws of nineteen hundred and nine and by chapter five hundred and four of the laws of nineteen hundred and ten, is hereby renumbered three and amended to read as follows:

3. **[2]** Every such contract shall contain such terms and conditions as to the rates of fare to be charged and the character of service to be furnished and otherwise as said commission shall deem to be best suited to the public interests, and subject to such public supervision and to such conditions, regulations and requirements as may be determined upon by said commission, with like approval; provided, that in case different parts of a road shall be constructed at different times or at intervals of time, or if the contract shall provide for the use by the contractor of an existing railroad as part of a continuous route as aforesaid, then and in any such case the public service commission may, in its discretion, prescribe periods for the operation of the different parts of said road so that at one period of time in the future the commission may be enabled to make a single operating contract or lease of the entire road. *The said commission may in its discretion, as one of the terms and conditions of any such contract, provide that as a consideration for the making of such contract the contractor in addition to any sums to be paid as in this act provided by way of rental or otherwise for the use of such road or roads shall contribute a part of the cost of construction of such road or roads which shall be contributed and disbursed by such method, in such*

manner and at such times as may be provided for in any such contract, and which contribution shall be deemed to be an investment by the contractor in the construction of such road or roads or to be part of the cost to the contractor of constructing such road or roads within the meaning of the first subdivision of this section providing for termination of such contract by the city. Any such contract may provide for the construction during the term of such contract of any branches or extensions of such road or roads and the construction of additional lines and for the equipment and operation thereof by the contractor in connection with the said road or roads and may make separate provision for apportioning the receipts of such road or roads and of such branches, extensions or additional lines and as to the compensation to be paid to the city for the use of any such branches, extensions or additional lines. The city may enter into a contract for the equipment, maintenance and operation of any such road or roads before contracts for construction of such road or roads or any portion or portions thereof shall have been made, and in such case the contract may provide that the city may construct or complete such road or roads or additions thereto or betterments thereof from time to time at the expense of the city or partly at the expense of the city and partly at the cost or through contribution of the contractor as aforesaid in such proportion as may be agreed upon between the city and the contractor. Such contract for the equipment, maintenance and operation of such road or roads or any portion or portions thereof may be made and entered into as is

this act provided before the consents shall have been obtained for any such road or roads or for any portion or portions thereof as provided in section five of this act, and before the detailed plans and specifications shall have been prepared as provided in section six of this act, provided, however, that in such case such contract for equipment, maintenance and operation of such road or roads or any portion or portions thereof shall be upon condition that such contract shall not become operative or go into effect as to such road or roads or such portion or portions thereof unless and until the city shall acquire the right to construct such road or roads or portion or portions thereof by obtaining such consent. The public service commission may in any contract reserve the right, upon conditions and for compensation to the contractor, as provided in the contract, to permit other persons, firms and corporations and the municipality itself to use the tracks, structure and line equipment of the railroad, or any portions thereof.

§ 9. Subdivision three of section twenty-seven of said chapter, as amended by chapter four hundred and ninety-eight of the laws of nineteen hundred and nine, is hereby renumbered four and amended to read as follows:

4. [3] Every such contract shall further provide that the person, firm or corporation so contracting to equip, maintain and operate said road shall annually or at specified intervals pay into the treasury of said city, such rental for the use of said road, as shall be prescribed therein. The rental may be either a specified sum of money or a specified *part or* portion of

income, earnings or profits of such road, or both a sum of money and a *part or* proportion of income, earnings or profits, as the said commission shall deem best suited to the public interest and the board of estimate and apportionment or other analogous local authority of such city shall approve. Every such contract may further provide that the amount and character of such rental may be readjusted at the expiration of a prescribed period[, which shall] *of* not [be] more than twenty years, and [shall] be readjusted from time to time in the future at intervals each of not more than twenty years, and may prescribe a method of determining by arbitration or by the court the amount to be paid upon any readjustment thereof. *If such contract be made with a person, firm or corporation owning or actually operating or agreeing to operate a railroad or railroads wholly or in part within the limits of the city and shall make provision for the equipment, maintenance and operation of such road or roads of the city in connection with such railroad or railroads and for a single fare, the contract may provide that the gross receipts from the operation of such railroad or railroads within the limits of the city and from the operation of such road or roads of the city may be combined during the term of such contract and that the city shall receive for the use of the said road or roads at intervals named a specified part or proportion of the income, earnings or profits of the railroads whose receipts are so combined and the contract may, in such case, apportion out of the amount so to be received by the city and specify a portion thereof which*

shall be deemed to be the rental for the use of each of the roads of the city maintained, equipped and operated under such contract. In any such case the contract shall provide for determining the amount of the income, earnings or profits of the railroads whose gross earnings are so combined, and may authorize the retention, prior to the payment of any sums to the city for or on account of the city's investment in the construction of such road or roads or for the use of the same, of (a) a specified sum of money, which may represent the average annual income from operation of said railroad or railroads theretofore constructed during a period specified in such contract; (b) a sum not exceeding six per centum per annum for each year upon the investment of the contractor, including brokerage charges not exceeding three per centum, in the construction and equipment of the said road or roads of the city to be maintained and operated under such contract, and in the construction and equipment of extensions of any railroads and tracks not owned by the city thereafter constructed and to be operated under such contract; and (c) a sum not exceeding the annual expense or cost to the contractor, plus one per centum per annum, on account of the contractor's investment in betterments or improvements upon, or additions to such road or roads of the city, and upon or to any railroads not owned by the city and operated under such contract, and upon or to the equipment thereof. Such contract may also provide that such pay-

ments shall be cumulative, and that any deficiency with respect thereto shall be paid off and discharged annually out of the said gross receipts before any payments by way of rental or compensation for the use of such roads shall be made to the city. The contract may provide for a readjustment at specified intervals of the part or proportion of the said income, earnings or profits of the railroads, which the city shall receive, or of the portion of the amount received by the city which shall be deemed to be the rental of each such road owned by the city, and may prescribe a method of determining by arbitration or by the court the amount which the city shall receive as its part or proportion of such income, earnings or profits or as such rental upon any such readjustment thereof.

§ 10. Subdivision four of section twenty-seven of said chapter, as amended by chapter four hundred and ninety-eight of the laws of nineteen hundred and nine, is hereby renumbered five and amended to read as follows:

5. **[4]** Such rental and the term for the operation of the railroad included in any such contract shall begin, as to said road, or any section thereof, *at such time or times as may be provided in the contract.* **[**when the same shall be declared by the public service commission to be completed and ready for operation.**]** The aforesaid rental shall be paid at such times during each year *or at such intervals* as said commission shall require. If a contract to equip, maintain and operate such road be made with the person, firm or corporation having or to have the contract to con-

struct the same *and such contract shall provide that* [, the contract may provide that, in lieu of the rental above provided for,] said road shall be constructed wholly or in part at the cost of the said person, firm or corporation, the said road, however, to be the property of the city in the same manner and to the same extent as if constructed wholly with public money, [and] *then* [in such case] the contract *may* [shall also] provide *as an alternative in lieu of the rental above provided for* that any and all income and increase derived by the contractor or on his behalf in any manner from the enterprise of constructing, equipping, maintaining and operating such road, shall after deducting operating expenses, taxes, payments to reserve and amortization funds as provided for in the contract, and not exceeding six per cent. interest per annum payable quarterly upon the actual cost to the contractor of construction and equipment of such road, be divided share and share alike between the contractor and the city. The rental and any sums payable under such contract, *except any sum or sums of money that may be contributed toward the construction of any road or roads by the contractor having the contract for the equipment and operation of such road or roads*, shall be applied first to the payment of the interest upon bonds issued by said city for the construction and equipment of said road as hereinafter provided for, as the same shall accrue and fall due, and the remainder of said rental and moneys not required for the payment of said interest shall be kept separate and apart from any and all other moneys of such city and shall be securely invested and, with the

annual accretions of interest thereon, shall constitute a sinking fund for the payment and redemption at maturity of the bonds issued as aforesaid; said rental, moneys and accumulations of said fund over and above so much as may be required for payment of interest and principal of said bonds as aforesaid, shall be paid into the rapid transit fund hereinafter provided for.

§ 11. Subdivision six of section twenty-seven of said chapter, as amended by chapter four hundred and ninety-eight of the laws of nineteen hundred and nine, is hereby renumbered seven and amended to read as follows:

7. **[6]** *In case the title to the equipment of said road shall not be vested in the city* **[T]** the city in and for which said road shall be constructed shall also have a first lien upon the rolling stock and other property of said contracting person, firm or corporation, constituting the equipment of said road and used or intended for use in the maintenance and operation of the same, as further security for the faithful performance by such contracting person, firm or corporation of the covenant, conditions and agreements of said contract, on his, their, or its part to be fulfilled and performed, and in case of the breach of any such covenant, condition and agreement said lien shall be subject to foreclosure by action, at the suit of such city, in the same manner, as far as may be, as is then provided by law in the case of foreclosure by action of mortgages on real estate. The commission **[,]** may, however, from time to time, relieve from such lien, any of the property to which the same may attach, upon receiving additional security,

which may be deemed by said commission to be the equivalent of that which it is proposed to release and otherwise upon such terms as to such commission shall seem just.

§ 12. Subdivision seven of section twenty-seven of said chapter, as amended by chapter four hundred and ninety-eight of the laws of nineteen hundred and nine, is hereby renumbered eight and amended to read as follows:

8. [7] The said contract shall further provide that in case of [default in paying the sum or rental therein provided for, or in case of] the failure or neglect on the part of said contracting person, firm or corporation, *after such notice as the contract may prescribe*, faithfully to observe, keep and fulfill the conditions, obligations and requirements of said contract, the said city, by the public service commission, may *either terminate the contract or* take possession of said road and the equipment thereof, and as the agent of said contracting person, firm or corporation, either maintain and operate said road, or enter into a contract with some other person, firm or corporation for the maintenance and operation thereof, [retaining out of the proceeds of such operation, after the payment of the necessary expenses of operation and maintenance, the sum or rental hereinbefore referred to, and paying over the balance, if any, to the person, firm or corporation with whom the first contract above mentioned was made, and if such proceeds of the operation of said road, after the payment of the necessary expenses of maintenance and operation, including the

keeping in repair of the rolling stock and other equipment, shall in any period be less than the sum or rental hereinbefore referred to and provided in the first contract, then and in that case, the said contracting person, firm or corporation, and his or its bondsmen, shall be and continue (but in the case of any bond hereafter executed, each bondsman only to the extent of the liability expressly assumed by him upon the bond) jointly and severally liable to the aforesaid city for the amount of such deficiency, until the end of the full term for which the said first contract was originally made.] *and the said contract shall contain such terms, conditions and provisions in relation thereto as the said commission shall deem necessary or desirable for adequately safeguarding and protecting the rights and interests of said city; and the said contract shall contain appropriate terms, conditions and provisions for accomplishing such termination or taking possession.*

§ 13. Subdivision eight of section twenty-seven of said chapter, as amended by chapter four hundred and ninety-eight of the laws of nineteen hundred and nine, is hereby renumbered nine and amended to read as follows:

9. [8] Any existing railroad corporation owning or actually operating a railroad wholly or in part within the limits of the city in and for which said commission has power to act, and approved by the commission, shall be competent and is hereby authorized to enter into any contract for the equipment, maintenance and operation of any railroad pursuant to the provisions of this chapter, or, after such a contract shall have been made,

shall be competent and is hereby authorized, with the approval of the commission, to contract with the original contractor or his assignee or assignees for the maintenance and operation, (including the equipment or any part thereof,) of any railroad constructed or in process of construction *or to be constructed* pursuant to the provisions of this chapter, and shall have all the powers necessary to the due performance of such contract. A corporation may be organized under the railroad law of this state, *for the purpose of constructing, equipping, maintaining and operating a railroad pursuant to the provisions of this act or* for the purpose of maintaining and operating a railroad, (including the equipment or any part thereof), already constructed, [or] in process of construction *or to be constructed* pursuant to the provisions of this [chapter] *act*; and any corporation so organized, upon the approval in writing of the commission, shall, in addition to the powers conferred by the general act under which such corporation is organized, be empowered, and is hereby authorized to enter into any contract permitted by law for the maintenance and operation when constructed, including the equipment or any part thereof if desired, as the case may be, of any such railroad *owned or to be owned by the city*, constructed or to be constructed at the expense of the city *or of such corporation or both* as in this act provided. The certificate of such approval shall be filed in the office of the secretary of state, and a copy thereof certified to be a true copy by the secretary of state or his deputy, shall be

evidence of the fact therein stated. A corporation so organized shall not be required to procure the consent of the public service commission as provided for in section [fifty-]nine of the railroad law.

§ 14. Subdivisions five and nine of section twenty-seven of said chapter, as amended by chapter four hundred and ninety-eight of the laws of nineteen hundred and nine, are hereby renumbered respectively six and ten.

§ 15. Subdivision three of section twenty-nine of said act, as amended by chapter four hundred and ninety-eight of the laws of nineteen hundred and nine, is hereby amended to read as follows:

3. It shall be deemed to be part of every such contract that, in case the public service commission shall cease to exist, the legislature may provide that public officer or officers of the city shall exercise the powers and duties belonging to the commission under or by virtue of any such contract, and that in default of such provision, such powers and duties shall be deemed to be vested in the mayor of the city. Every such contract shall *contain appropriate terms, conditions and provisions for safeguarding the interests of the city in the event of the failure or neglect of such* [provide that if the] contracting person, firm or corporation [shall fail] to construct, equip, maintain or operate the railroad according to the terms of the contract, and [shall, after the due notice of its default, omit for more than a reasonable time to comply with the provisions of such contract,] the public service commission may bring *such* [an] action *or actions* in the name and in behalf of the city [to forfeit and vacate all the rights of such contracting person, firm

or corporation under such contract, and for damages and otherwise] as may be necessary for the sufficient and just protection of the rights of the city; or may, upon such terms as to the public service commission seem just, and with such person or corporation as to the commission may seem proper, make another operating contract and lease of the said road for the residue of the term of the contractor in default; and may bring action in the name and on behalf of the city to recover from the contractor the amount due from the contractor, less the amount which shall have been received by the city, under or by virtue of such new contract, and for all other damages sustained by the city by reason of such default.

§ 16. Section thirty-three of said chapter, as amended by chapter four hundred and ninety-eight of the laws of nineteen hundred and nine, is hereby amended to read as follows:

§ 33. *Extensions and additional lines.* 1. [If or as soon as consents, where necessary, have been obtained for any rapid transit railroad which is an extension or a continuation in the same general direction of any existing rapid transit railroad, or any portion thereof, constructed wholly or in part at the public expense under the provisions of this act and wholly or in part in operation, and the plans and specifications have been prepared as provided in section six of this act,] *Whenever* the said public service commission *shall determine that the public interests so require, it* may with the approval of the board of estimate and apportionment or other analogous local authorities of such city, *without advertising*

for proposals, but only after a public hearing under section thirty-seven of this act, enter into a contract *or contracts with the person, firm or corporation owning, operating or agreeing to operate, any existing rapid transit railroad or railroads for the construction, equipment, maintenance and operation, or for the equipment, maintenance and operation of any additional or proposed rapid transit railroad or railroads to be owned by the city for which necessary consents as provided in section five of this act shall have been obtained, provided that such proposed railroad or railroads shall be operated in conjunction with said existing railroad or railroads for a single fare. Such contract for the equipment, maintenance and operation of such road or roads or any portion or portions thereof may be made and entered into before consents shall have been obtained therefor as provided in section five of this act, provided, however, that in such case such contract for equipment, maintenance and operation of such road or roads or any portion or portions thereof shall be upon condition that such contract shall not become operative or go into effect as to such road or roads or such portion or portions thereof unless and until the city shall acquire the right to construct such road or roads or portion or portions thereof by obtaining such consents.*

Such contract or contracts for construction, equipment, maintenance and operation or for equipment, maintenance and operation [for construction at the public expense and for equipment, maintenance and operation of said railroad] *may be made* in either of the two following ways:

(*a*) [1.] *If such existing railroad be wholly or in part within the limits of the city, such contract may be made under and pursuant to the provisions of sections twenty-six, twenty-seven and twenty-nine, so far as the same shall be applicable, with the railroad corporation owning or actually operating or agreeing to operate such existing railroad, but the term for equipment, maintenance and operation of such proposed road, as specified in said contract, pursuant to said sections, shall not be for a period longer than the unexpired term of the franchise or contract for the maintenance and operation of such existing railroad and any renewals provided for in such franchise or contract.*

(*b*) *If such existing railroad be a rapid transit railroad constructed wholly or in part at the public expense under the provisions of this act and wholly or in part in operation such contract may be made* [W]with the person or corporation having the contract for the construction and operation of said existing rapid transit railroad by the terms of which the said proposed rapid transit railroad *if not constructed or to be constructed by the commission under separate construction contracts* shall be construed as extra work under the terms of the said existing contract either without expense to the city or for such sum of money *or such proportion of the actual cost thereof* as may be agreed upon to be paid by such city for or toward the construction thereof, the said railroad when *so* completed *as extra work* to be subject to the terms and conditions of the said original contract except so far as shall be otherwise specified and agreed.

[2. Under the provisions of sections twenty-six, twenty-seven and twenty-nine, so far as the same may be applicable, with the person or corporation operating such existing railroad as lessee thereof, in which case the contract for maintenance and operation of said proposed railroad shall be for a term of years to be specified in said contract, which may be until but not beyond the date at which the original lease or contract for operation of such existing railroad, and any renewal of the term thereof, provided for in such contract, shall expire. The contract may provide for readjustment of the amount of any rental to be paid under such contract from time to time in the future to the end of the term at intervals of not more than twenty years, and prescribe a method of determining by arbitration or by the court the amount to be paid upon any readjustment thereof.]

2. [3] Every such contract for such construction, equipment, maintenance and operation *or for such equipment, maintenance and operation* of such proposed railroad made in either of the foregoing specified ways, shall also make provision that the city may, upon giving a specified notice, terminate the contract for equipment, maintenance and operation of any such proposed railroad *as to all and if deemed advisable as to any specified portion or portions thereof* at any time after the expiration of ten years from the date when operation of any part of such proposed railroad *or of such specified portion thereof* shall actually begin, but such right of termination of any such contract shall be upon condition as follows:

(1) *If the title to the equipment of said proposed railroad or railroads shall not be vested in the city then* [T]*t*hen the equipment of the said proposed railroad *or portion thereof* suitable to and used for the purposes of such railroad as apportioned pursuant to the contract, shall be purchased and taken by the city at an amount which shall be ascertained as provided in the contract, but which shall not be greater than the actual cost of the same, plus fifteen per centum thereof, and such equipment shall, upon such termination of said contract become and be the property of the city on paying to the contractor said amount; *or in case the title to the equipment of said proposed railroad shall be vested in the city then that the city shall pay to the contractor an amount for his investment in the equipment of said proposed railroad, or portion thereof, which shall not exceed the actual cost to the contractor of equipment of said railroad or portion, plus fifteen per centum thereof, and shall decrease under provisions of the contract as the term thereof continues so that at the end of the full term of the contract no such amount shall be paid except that if additional equipment shall be required and supplied after the railroad, or portion thereof, shall have been put in operation, and if the contract shall provide that title to such additional equipment shall vest in the city when supplied, then the city shall pay an amount for the contractor's investment in such additional equipment which amount shall not exceed the actual cost to the contractor of such additional equipment plus*

fifteen per centum thereof and shall diminish so that at the end of the full term of the contract the city shall be required to pay for such investment in additional equipment only such amount as shall be provided in such contract.

(2) Upon the further condition if such proposed railroad shall be constructed wholly or in part at the cost of the contractor that the city shall also pay to the contractor an amount for his investment in the construction of said proposed road *or portion thereof*, which shall not exceed the actual cost to the contractor of constructing said road *or portion*, plus fifteen per centum thereof, and shall decrease under provisions of the contract as the term thereof continues so that at the end of the full term of the contract no such amount shall be paid [.], *except that if betterments, additions or improvements shall be required by the commission or approved by the commission prior to the construction thereof and be constructed wholly or in part at the cost of the contractor, then that the city shall pay an amount for the contractor's investment in such betterments, additions or improvements which shall not exceed the actual cost to the contractor of constructing such betterments, additions or improvements plus fifteen per centum thereof and which amount shall diminish so that at the end of the full term of the contract the city shall be required to pay for such investment in betterments, additions or improvements only such amount as shall be provided in the contract.*

3. The contract shall provide a method of ascertaining the

amount to be paid for said equipment and for the contractor's investment in the construction of said proposed road upon a termination by the city of such contract and for the equipment of said proposed railroad at the end of the full term of the contract, and may provide for determining from time to time, in default of agreement, by arbitration or by the court, a valuation of the contractor's said investment in the construction of said proposed road and of the equipment or any part or portion of either thereof for any purpose under said contract. *The contract may provide that the title to the equipment as well as to said road shall vest in the city from the beginning and that the amount to be paid by the city for the contractor's investment in such equipment shall decrease as the term of the contract continues so that at the end of the full term of the contract no amount shall be payable therefor except for additional equipment as aforesaid.* The contract shall [also] provide that upon the expiration of the term fixed in the contract, the contract shall end without compensation to the contractor except *as provided in the contract, for betterments, additions or improvements to any such railroads required to be made or approved by the commission prior to the construction thereof during the term of any such contract, and, if the title to the equipment be not vested in the city,* for equipment [,] *suitable to and used for the purposes of said contract to the amount, if any, ascertained as provided in the contract* and that *in such event* such equipment shall become the property of the city upon payment to the con-

tractor of [an] *the said* amount [to be ascertained as provided in the contract.], *or, if the title to the equipment be vested in the city, then an amount for the contractor's investment in additional equipment for any such railroads to be ascertained as provided in the contract.*

4. The contract may also include a provision for modification of the lease or contract for equipment, maintenance and operation of said existing rapid transit railroad so that such last named lease or contract may be terminated by the city upon giving a specified notice at the same time and in connection with the termination of the contract as to such proposed railroad, but such right of termination of any such contract as to said existing rapid transit railroad shall be upon condition (1) that the equipment of the said railroad suitable to and used for the purposes of such contract shall be purchased and taken by the city at an amount which shall be ascertained as provided in the contract, but shall not be greater than the actual cost of the same plus fifteen per centum thereof, and such equipment shall, upon such termination of such contract, become and be the property of the city on paying to the contractor such amount, and (2) upon the further condition, if said existing railroad shall have been constructed wholly or in part at the cost of the contractor, that the city shall also pay to the contractor or to his assignee in possession an amount for the investment in the construction of said existing road which shall not exceed the actual cost to the contractor of constructing such road, plus fifteen per centum

thereof, and shall decrease under the provisions of the contract as the term thereof continues, so that at the end of the full term of the contract, and of any renewal thereof contained therein, no such amount shall be paid. The contract as so modified shall provide a method of ascertaining the amount to be paid for said equipment and for the contractor's investment in the construction of said road upon a termination by the city of said contract, and for the equipment of said existing railroad at the end of the full term of the contract; and may provide for determining from time to time, in default of agreement, by arbitration or by the court, a valuation of the contractor's said investment in the construction of said road and of the equipment, or any part or portion of either thereof, for any purpose under said contract. The contract may also provide for assuring that in case a new contract for equipment, and for maintenance and operation of said existing rapid transit railroad, or proposed rapid transit railroad, is made after such termination, pursuant to notice, or after the expiration of the full term of such contract, that the title to and possession of the equipment so taken and the right to the possession of the railroad or railroads so constructed may be transferred directly to the new contractor upon his paying the amount so required.

§ 17. Subdivision two of section thirty-four of said chapter as amended by chapter four hundred and ninety-eight of the laws of nineteen hundred and nine, is hereby amended to read as follows:

2. Every grant or contract made under the provision of this article by the terms of which the city in lieu of rental shall be entitled to a portion of income or increase derived from the enterprise shall make provisions for definition and determination from time to time of the items to be included in operating expenses, taxes, payments to reserve and amortization funds and for the percentages or amounts to be set aside therefor and for interest upon construction cost. The commission shall prescribe in the grant or contract a period for amortization by the grantee or contractor of the actual cost of plant and property other than equipment, or actual cost to the contractor of the construction of such road, and the period so prescribed shall end with the term of the grant. Any and all sums of moneys hereafter received by the city from or under any grant or contract heretofore or hereafter made under the provisions of this act, over and above such sum or sums as are required by law to be paid into a sinking fund to meet the payment of interest or principal on city bonds issued for construction *and equipment* of any railroad pursuant to any such contract, *and except any sum or sums of money that may be contributed toward the construction of any road or roads by the contractor having the contract for the equipment and operation of such road or roads*, shall be kept separate and apart from any and all other moneys of such city and paid into a fund to be known as the rapid transit fund, and shall be applied under the direction of the board of estimate and apportionment or other analogous local authority of such city only to

or toward the construction of railroads, or the purchase of plant and property or equipment of railroads, pursuant to the provisions of this act, or to deficiencies in the operation or rental of railroads owned by the city, or in the operation of railroads owned and operated by the city pursuant to this act.

§ 18. Section thirty-eight of said chapter as amended by chapter four hundred and ninety-eight of the laws of nineteen hundred and nine is hereby amended to read as follows:

§ 38. Modification of contracts. The public service commission for and on behalf of the said city in which such road or roads may be constructed, may, from time to time with the consent, in writing, of the bondsmen or sureties of the person, firm or corporation which has contracted with said commission or its predecessors to construct, equip, maintain or operate any road or roads, agree with the said contracting person, firm or corporation upon changes in and modifications of said contract, or of the plans and specifications upon which said road or roads is or are to be constructed, but no change or modifications in the plans and specifications consented to and authorized pursuant to section five of this act shall be made without the further consent and authorization provided for in said section[; and by such modification provision may be made in the case of any contract existing at the date hereof that the city may, upon giving a specified notice, terminate such contract at any time after the expiration of ten years from the date of said modification upon condition that the equipment of the said railroad or railroads suitable to and used

for the purposes of such contract shall be purchased and taken by the city at an amount which shall be provided for in the contract but which shall not be greater than the actual cost of the same plus fifteen per cent. thereof, and if said railroad shall have been constructed wholly or in part at the cost of the contractor then upon the further condition that the city shall also pay to the contractor or to his assignee in possession and operating said railroad an amount for the contractor's investment in the construction of such road which shall not exceed the actual cost to the contractor of constructing such road plus fifteen per centum thereof, and shall decrease under the provisions of the said contract of modification as the term thereof continues thereafter so that at the end of the term of said contract and any renewal thereof contained therein no such amount shall be paid. The contract as so modified shall provide a method of ascertaining the amount to be paid for said equipment and for the contractor's investment in the construction of said road upon a termination by the city of such contract and for the equipment of such railroad at the end of the full term of the contract, and may provide for determining from time to time in default of agreement by arbitration or by the court a valuation of the contractor's said investment in the construction of said road and of the equipment or any part or portion of either thereof for any purpose under said contract.

The contract as so modified may also provide for assuring that in case a new contract for equipment and for maintenance and

operation of said roalroad is made after such termination pursuant to notice or upon the expiration of the full term of the contract, that the title to and possession of the equipment so taken and the right to the possession of the railroad so constructed may be transferred directly to the new contractor upon his paying the amount so required].

§ 19. Subdivision one of section thirty-nine of said chapter, as amended by chapter four hundred and ninety-eight of the laws of nineteen hundred and nine, is hereby amended to read as follows:

1. For the purpose of constructing or operating any road for the construction or operation of which a contract shall have been made by the board of rapid transit railroad commissioners or the public service commission, including necessary stations and station approaches, or for the purpose of operating or securing the operation of the same free of interference and right of interference and of action and right of action for damages and otherwise, whether by abutting owners or others, or to provide, lay or maintain conduits, pipes, ways, or other means for the transmission of electricity, steam, water, air or other source or means of power or of signals or of messages necessary or convenient for or in the construction or operation of such road, or for the transportation of materials necessary for such construction or operation, or to provide a temporary or permanent way or course for any such conduit, pipe or other means or source of transportation, said com-

mission for and in behalf of said city may acquire, by conveyance or grant to said city to be delivered to the said commission and to contain such terms, conditions, provisos and limitations as the said commission shall deem proper, or by condemnation or other legal or other proceedings, as in this act provided, any real estate and any rights, terms and interests therein, any and all rights, privileges, franchises and easements, *including such of any thereof as may be already devoted to a public use*, whether of owners or abutters, or others to interfere with the construction or operation of such road or to recover damages therefor, which, in the opinion of the commission, it shall be necessary to acquire or extinguish for the purpose of constructing and operating such road free of interference or right of interference.

§ 20. This act shall take effect immediately.

Note:

Chap. 504, Laws 1910, was Assembly Bill Int. 1753, Pr. No. 2676, Introduced by Mr. A. E. Smith. It amended subdiv. 2 of section 27 of the Rapid Transit Act (the provision which requires the contract to contain terms and conditions as to rates of fare and character of services).

The amendment consists of 6 lines, as follows:

> "The Public Service Commission may in any contract reserve the right, upon conditions and for compensation to the contractor, as provided in the contract, to permit other persons, firms and corporations and the municipality itself to use the tracks, structures and line of the railroad, or any portion thereof."

In the Wagner bill, considerable new matter was inserted ahead of the Smith amendment, which appears at the end of the section, in lines 11-16 on page 147, *supra*.

By Chapter 205 of the Laws of 1910, subdivision 1, of section 6 of the Rapid Transit Act, was amended so as to permit of the inclusion in the equipment provisions of a device "for guiding a conveyance in a definite path."

Subdivision 4 of section 26 was amended by adding at the end a provision that

> "any such contract, in lieu of requiring the contractor to provide equipment or any part thereof, for generation for furnishing of motive power, may authorize the contractor to enter into a sub-contract or sub-contracts for purchase and delivery"

thereof, etc.

Section 28 was amended by inserting after the words

> "or such other analogous authority, equip said road or roads in whole or in part"

the following:

> "*or purchase power for operation thereof.*"

By Section 4, Section 39 of the Act was amended by adding two new subdivisions numbered "4" and "5", one for temporary lease by the Commission, and the other in relation to the effect of easements.

By Section 5, Section 62 was amended in a very minor particular.

By Chapter 505 of the laws of 1910, section 4 of the Rapid Transit Act was amended so as to exclude a portion of Nostrand Avenue from subway construction.

By Chapter 506 of the laws of 1910, section 20 of the Rapid Transit Act was amended by adding a provision at the end in relation to condemnation proceedings.